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1 Sutherland, *Statutory Construction* (3d Ed., 1943), 438; 2 *id.* 136	41
United States Treasury Department, *Merchant Vessels of the United States, 1943* (Gov't. Print. Office), p. 51	110

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 42

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PITTSBURGH STEAMSHIP COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

PRIOR OPINIONS

The opinion of the Court of Appeals (R. 870), is reported at 180 F. 2d 731. The original opinion of the Court of Appeals is reported at 167 F. 2d 126. The opinion of this Court reversing and remanding the case for further proceedings is reported at 337 U. S. 656. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 854–857) are reported in 69 NLRB 1395.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1950 (R. 868). The

petition for a writ of certiorari was granted on May 8, 1950. The jurisdiction of this Court is invoked under Section 1254 of 28 U. S. C., as codified June 25, 1948, and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether procedural and evidentiary provisions of the Administrative Procedure and Labor Management Relations Acts apply retroactively to administrative proceedings which (apart from judicial review) have been completed before those statutes became effective.

2. Whether the scope of judicial review of findings of fact made by the National Labor Relations Board has been enlarged by the Administrative Procedure and Labor Management Relations Acts.

3. Whether the Board's findings are supported by substantial evidence on the record considered as a whole. Aspects of this question are:

(a) Whether the court below erroneously substituted its judgment on the facts for that of the Board.

(b) Whether the court below improperly made its own determinations as to the credibility of witnesses in lieu of accepting the reasonable determinations made by the Board.

(c) Whether the Company is responsible for unfair labor practices committed by the chief officers on its ships.

(d) Whether the company can escape responsibility because the evidence related only to seven out of seventy-three ships.

(e) Whether the Board relied, improperly, upon incompetent or hearsay evidence.

STATUTES INVOLVED

The statutory provisions principally involved are the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. 151), Sections 7, 8, 10 (b); the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. II, 141, *et seq.*), Sections 8 (a), (c), 10 (b), (c), (e), and Section 104; and the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*), Sections 7 (c) and 10 (e). The pertinent provisions are set forth in the Appendix, *infra,* pp. 145–152.

STATEMENT

On April 5, 1948 the court below first set aside the order of the National Labor Relations Board here involved on the ground that the Trial Examiner had credited all the Board's witnesses and was, therefore, biased and prejudiced. (167 F. 2d 126.) On June 20, 1949, this Court issued its opinion reversing and remanding the cause to the Court of Appeals for the Sixth Circuit for further proceedings not inconsistent with its opin-

ion. 337 U. S. 656. The Court, after "careful scrutiny of the record" decided that "the printed transcript suggests thoughtful and discriminating evaluation of the facts" (337 U. S. at 660), but that, "Without doubting the existence here of evidence substantial enough under the Wagner Act * * * to warrant the Board's findings, we are not certain whether that standard controls this case." 337 U. S., at 661. This Court held that the questions of whether the Administrative Procedure Act and the Taft-Hartley Act "are applicable to and, if applicable, in any way affect Board procedures and the scope of judicial review of Board orders" (337 U. S., at 661) should "be considered in the first instance by the Court of Appeals." 337 U. S., at 662.

The Court of Appeals on February 17, 1950, handed down its opinion and decree again denying enforcement of the Board's order (R. 868–884). The court held that the Taft-Hartley Act and the Administrative Procedure Act were applicable to review of the instant case and that each of these Acts broadened the scope of judicial review beyond the requirements of the Wagner Act. The court further held that Sections 8 (c), 10 (b), and 10 (c) of the Taft-Hartley Act, as well as Section 7 (c) of the Administrative Procedure Act, which deal not with scope of judicial review, but with agency procedure, are applicable to the proceedings and decision of the Board in this case, although the Board's decision preceded

enactment of these statutes. Applying the "broadened" scope of review and revised evidentiary and procedural standards, the court held that the Board's findings of fact were not supported by "reliable, substantial and probative evidence." Inasmuch as the decision below turns upon the facts of the case, a rather extensive statement of the facts is necessary.

I

THE FACTS

Upon the usual proceedings under Section 10 of the Act, the Board, after reviewing and considering the entire record in the case, the intermediate report of the Trial Examiner, the exceptions, briefs and argument, issued its decision and order on August 13, 1946 (R. 854–857), finding that The Pittsburgh Steamship Company, hereinafter called the Company, had violated Section 8 (1) and (3) of the Act. The following summary of the facts as found by the Board (R. 854–855, 801–839) shows the nature of the case and the more than substantial evidence supporting the findings.

A. THE COMPANY'S INTERFERENCE, RESTRAINT AND COERCION IN VIOLATION OF SECTION 8 (1) OF THE ACT

Prior to and during the March to November 1944 sailing season for the Company's freighters on the Great Lakes, the National Maritime Union, C. I. O., hereinafter called the Union, made an

intensive drive to organize the Company's unlicensed personnel (R. 801–802; 1–2, 13, 47, 124–125, 277, 533, 697).[1] To this end the Union designated a crew member on each of the Company's approximately seventy freighters to act as a volunteer organizer (R. 807; 13, 39, 140, 252, 533, 664). On November 8, 1943, it petitioned the Board to conduct an election to determine whether the unlicensed personnel desired the Union to represent them (R. 802; 274, 697, 760).

During the Union's organizational drive, and particularly prior to the election held by the Board in June 1944 (R. 802; 26–27, 127, 273–274, 761),[2] the Company, as the Board found, engaged in a course of conduct designed to "defeat the Union in the election, and, beyond that, to discourage and frustrate the organizational efforts of the Union" (R. 823–824). The Company's offensive against the Union was carried on by its licensed personnel, supervisory employees with authority to hire and discharge or effectively to recommend the discharge of the unlicensed personnel (R. 801–802; 13, 54, 85–86, 171, 213, 258, 261, 272, 275–276, 556–557).[3]

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[1] Wherever in a series of references semicolons appear, the references preceding the semicolons are to the Board's findings; those which follow are to the supporting evidence.

[2] The Union failed to receive a majority of the votes cast (R. 802; 27, 274, 761).

[3] The licensed personnel on each vessel consisted of the captain or master of the vessel, the chief engineer, three mates rated as "first," "second," and "third," and three assistant engineers who were similarly rated (R. 801; 13, 224–225).

1. THE DISCRIMINATORY AND ABUSIVE TREATMENT OF UNION LEADERS

Upon learning the identity of the organizers and other union members, the Company, on a number of the vessels, imposed restrictions upon their freedom of speech and movements which had never before been imposed upon any of the employees. It had been customary for members of the crew to talk freely to each other about any subject while at work as well as on their free time, and the Company had no rule forbidding such practice (R. 820; 318, 403).

On the *Morse,* shortly after Captain Gerlach learned that employee Weissflog was the ship's organizer, he approached Weissflog and warned him, "I know what you are here for. I will warn you * * * that while you are on watch and any of the other men are on watch, don't talk to them. When you are off watch and the other men are off watch you can do as you please" (R. 820; 308, 317–318, 604). Thereafter, upon finding Weissflog, during his regular lunch period, talking about the Union to other crew members in the messroom, which was used as a recreation place as well as a lunchroom, Captain Gerlach grabbed him and forcibly ejected him from the room stating that he did not want again to find Weissflog talking to crew members (R. 821; 60–62, 77, 324–325, 702–706). On another occasion when Captain Gerlach observed Weissflog talking to crew members in the firemen's quarters during his free time, Gerlach again physi-

cally ejected him from the room, stating that Weissflog had no reason to speak to the firemen, that he was going to stop Weissflog from speaking to anyone and that Weissflog "ought to go back to the salt water where [he] belonged" (R. 821; 62, 78, 329–330, 604).

On still another occasion when ten crew members, including ship organizer Weissflog, were late in returning to the ship from shore leave where they had been to the union hall, Captain Gerlach selected Weissflog alone for reprimand, stating in the presence of the other crew members that he was interested only in Weissflog because Weissflog was the organizer (R. 820–821; 58–59, 309). In addition to thus abusing the ship's organizer, Captain Gerlach attempted further unlawfully to discourage membership in the Union by urging deck hand Zmrazek to keep away from Weissflog, not to listen to him, and not to vote for the Union, warning him that even if the Union won the election it would be unable to obtain a contract with the Company for three or four years (R. 819; 42–43).

On the steamer *Widener,* Captain Lehne similarly sought to restrict the solicitation activities of Deck Watchman Babin, who had been designated as the ship's organizer (R. 816; 13). Early in April, the captain summoned Babin to an interview in his room (R. 816; 14). He opened the interview with the statement, "I understand you are an organizer aboard this ship." He then asserted

that "The company does not hire union men aboard any of their ships" and accused Babin of talking unionism to the men and interfering with their work (R. 816; 14). Upon two subsequent occasions Captain Lehne again summoned Babin to his room and reprimanded him for interfering with the work of the crew by talking unionism to them day and night (R. 816; 14–15). Upon these occasions Babin, as the Board found, had not in fact spoken of the Union to the men while they were at work (R. 816–817; 14–15, 39–40); Captain Lehne's unfounded accusations were designed to disguise his curbing of legitimate union activities, and to prevent the successful organization of crew members on the steamer *Widener* (R. 818).

Chief Engineer Hunger sought to isolate Babin from the other members of the crew and limit strictly his opportunities to proselytize for the Union. On one occasion prior to the election when Babin was performing his duties of marking the soundings on a board in the engine room and conveying instructions from the mate in regard to water to be turned on or shut off, the chief engineer, in vile language, ordered him to keep out of the engine room and to cease "talking Union" to the engine-room employees either in their quarters or in the engine room (R. 817; 17–18, 32–35). Up to that time it had been customary for deck watchmen to converse with the engine crew while engaged in their sounding

tasks in the engine room, and the Company had no rule prohibiting employees from talking while on watch (R. 818; 17–18, 318, 403).

On the *Filbert,* ship organizer Lee was admonished by Captain Brinker not to continue asking employees to join the Union after they had once told him "no" (R. 808, 825; 418).

2. Interrogation of Employees Regarding Their Union Membership

A number of the Company's representatives questioned employees concerning their own and their fellow employees' union membership and activities. On the steamer *Johnson,* Captain Wallace, about April 15, 1944, as a prelude to an attack upon the Union's policies, interrogated Wheelsman George Anderson in regard to his union membership (R. 812; 249–250). In May 1944, he asked Anderson whether there were any union members on the forward part of the ship, adding that he knew that the men were all union members in the aft part of the ship (R. 812; 251). In the same month, he asked Anderson whether he "was an organizer or just a good union man" (R. 812; 252). Finally, in June 1944, after the ship left Two Harbors where Anderson had visited the union hall, the captain asked him whether Watchman Bean and Wheelsman Carter (R. 812–813; 253–254), both of whom had been to the union hall, were members of the Union (*ibid.*). When Anderson told the captain to in-

quire of the men themselves, the captain remarked, "They were up to the union hall yesterday, weren't they? They must belong to the Union" (*ibid.*). Captain Wallace, as the Board found (R. 813), thereby conveyed the impression that the Company was engaged in surveillance of the union hall.[4]

Similarly, on the steamer *McGonagle,* Captain Penzenhagen asked one of the employees who was going ashore whether he was bound for the union hall (R. 813; 225); on the steamer *Bunson,* Captain Lawless asked ship organizer Vogt, in the presence of the crew, whether he belonged to the Union (R. 814; 84); and, on the steamer *Morse,* Captain Gerlach inquired of one of the employees under him concerning the identity of the ship organizer aboard that vessel (R. 819; 44).

3. Threats and Attempts to Discharge Union Leaders

Other representatives of the Company threatened to discharge or attempted unsuccessfully to discharge union leaders.

On board the *Olds,* the Company not only discharged one ship organizer, Shartle, because of his union membership and activities (see *infra,* pp. 13–21), but attempted to discharge Shartle's successor, Vogel, for the same reason. In June 1944, First Mate Dobson, upon overhearing Vogel

[4] None of this testimony was denied.

arguing with a deck hand about an accounting of union dues, turned to Vogel and stated: "So you are the union organizer. * * * You can pack up your clothes and get off" (R. 823; 215–216, 218). Vogel protested that the ship was sailing within an hour and that he would not have time to pack his clothes and leave the ship before it sailed (R. 823; 216, 223). Thereupon, First Mate Dobson agreed that Vogel should leave at the end of the trip (*ibid.*). At the termination of the trip, after Vogel had packed his clothes and was about to leave, the mate relented and expressed a willingness for Vogel to remain. Vogel, considering his future status on the ship insecure, left anyway (R. 823; 216, 224).

Chief Engineer Curry on board the *Filbert,* impressed upon ship organizer Lee the precarious nature of his position by telling him that John Zyp, assistant to the fleet captain, who was detailed to the personnel office (R. 810; 669, 670), had attempted to bring about Lee's discharge but that he, Curry, had saved Lee's job by advising the ship's captain, Brinker, that he would resign if Lee were discharged (R. 810–811; 134–135). Captain Brinker did not discharge Lee, but as stated, *supra,* p. 10, attempted to restrict him in his organizational activities.

On board the *Johnson,* Captain Wallace similarly sought to intimidate the ship's organizer, Sims. After berating the Union and telling Sims that he did not want "any part" of the Union on

his ship, Captain Wallace stated with reference to employee Anderson, who was then on shore leave: "Now this old Anderson on here, he is a great Union man. If he comes back drunk. if I catch him with a drink on him, well, the first chance I get I am going to fire him" (R. 811; 280). When Sims protested that Anderson was a good wheelsman, Captain Wallace replied, "Yes, he can wheel a steamboat, sure he can, but the first chance I get I am going to fire him" (*ibid.*).

B. THE DISCRIMINATORY DISCHARGE OF SHARTLE IN VIOLATION OF SECTION 8 (3) AND (1) OF THE ACT

Howard Shartle was hired on March 31, 1944, as a seaman on the steamer *Olds* (R. 830; 168, 170). He had received his A. B. certificate, which classified him as a certified able-bodied seaman, in July of the preceding year after three months' training at a government operated shore training school, three months' service as an apprentice seaman on Great Lakes vessels, and the successful completion of a United States Coast Guard qualifying examination (R. 830; 170, 177, 182–183). This experience, coupled with several months sailing thereafter on ocean vessels, represented the full sum of his experience at the date he was hired by the Company (R. 830; 169, 674, 681). It was, nevertheless, glad to obtain his services, for at that time the war was still in progress and there was a serious shortage of A. B. seamen (R. 833; 520, 668–669, 671–672).

Even after Shartle was hired the ship was still being operated with one less A. B. seaman than was required by the governing maritime regulations (R. 833; 177, 339, 507, 520).

Shartle had joined the Union prior to his employment by the Company and volunteered to act as its organizer on board the *Olds* (R. 830; 170, 182). Upon joining the crew of the *Olds,* he openly and actively engaged in organizational work among the unlicensed personnel (R. 830–831; 170–171, 179, 209). He also distributed copies of the Union's publication, the Pilot, among the crew members, including the immediate supervisors, the second and third mates, and to some of the other licensed personnel (R. 831; 170–171, 179, 209). Thus, the Company knew of Shartle's position as the ship's organizer (R. 832). The Board noted that even in the absence of direct proof of knowledge, the conclusion that the Company knew of Shartle's activities would have been warranted from the fact that, on a small ship such as the *Olds* where men live, eat, and work together for twenty-four hours a day, news of any interest, including news of organizational activities, spreads rapidly among the licensed, as well as the unlicensed, personnel (R. 831–832; 218–219, 317).

On April 24, 1944, First Mate Dobson discharged Shartle without prior warning for the alleged reason that he was "incompetent" (R. 832–833; 172, 174–176, 502). Shartle was re-

placed by an ordinary deck hand, no A. B. seaman being available (R. 833; 337, 502–503, 676–677). After Shartle's discharge, John Vogel, also a watchman on the *Olds,* was designated by the Union to succeed Shartle as the ship's organizer (R. 823; 213, 218). As has already been related (*supra,* pp. 11–12), when First Mate Dobson discovered about June 19, that Vogel had been designated as the ship's organizer, he attempted to discharge Vogel also. Only the fact that Vogel would have had insufficient time to pack his clothes and leave the ship before the scheduled sailing time saved his job for that trip (*ibid.*).

The Company contended at the hearing that Shartle was discharged for incompetence consisting of (1) lateness in reporting for work; (2) inability to wheel a boat properly; (3) failure to do his share of painting work during the fit-out period and an attempted interference with the painting work of others; (4) inability to handle the winches properly; (5) inability to supervise the deck hands under him; and (6) inability to splice a cringle (R. 833; 732).

The evidence disclosed that Shartle had been late in reporting for duty only once, and that upon that occasion, the day after he was hired, he was detained by the Company's physician to whom he had reported for a physical check-up pursuant to the Company's instructions (R. 833,

n. 38; 192–193). The Company did not thereafter, in its brief to the Board, urge lateness as one of the reasons for Shartle's discharge, and the Board regarded the Company's contention in this respect as having no weight and as having been abandoned (R. 833, n. 38). Similarly, the Board gave no weight to the testimony that Shartle's lack of proficiency in wheeling the ship contributed to its decision to discharge him, since the record shows that Shartel was competent in this respect, and that wheeling a ship is not one of the duties of a watchman, the job for which Shartle was hired (R. 834; 184, 185, 540).

The Board found that the other reasons assigned were likewise not the true reasons for Shartle's discharge (R. 838). The charge that Shartle failed to do more than one-half his share of painting during the fit-out period, and that upon one occasion he "razzed" fellow employees for painting more rapidly than he, was denied by Shartle (R. 834; 192, 193, 334–335, 513–514, 525). His painting partner, Vogel, never complained of having to do more than his share of the teamwork, and Shartle was never criticized or reprimanded for any shortcoming in this respect (R. 834; 176, 192, 216, 220–221, 349–350). The Board, under the circumstances, found that the testimony offered by the Company in support of its charge against Shartle was "greatly exaggerated and unreliable," and concluded that, in any event, the Company condoned any deficiency

which Shartle may have displayed at the task of painting when it permitted him to sail following the fit-out period (R. 834–835).

The Company's claim that Shartle was unable properly to operate the ship's winches was based upon a single incident of claimed negligence on Shartle's part occurring about 2 weeks before his discharge (R. 835; 500, 536–537). On that occasion, Shartle and the deck hand assisting him had failed to place the control lever in the proper position, which resulted in unduly tightening the cable wire and might have resulted in a parting of the wire had not Second Mate Chrobak noticed it and corrected the mistake (R. 835–836; 335–336, 524–525, 536). The *Olds,* unlike most vessels to which seamen are accustomed, was equipped with modern electric winches (R. 835, n. 42; 190, 534–535). New men aboard the vessel are not expected to know how to operate the winches; they are taught to do so by the mates; they work at first under the mate's close supervision and gradually are allowed greater responsibility (R. 835, n. 42; 336, 534–535). Shartle was not even reprimanded because of the incident and he continued thereafter as before to operate the winches under some supervision (R. 836, n. 43; 350, 533–534). First Mate Dobson conceded that although it was customary for him to report to the ship's captain serious cases of negligence on the part of employees, he did not inform the captain of Shartle's negligence (R. 515). Other seamen

had committed this same error aboard other vessels of the Company but had not been discharged therefor (R. 836; 344–345).

The Company next contended that Shartle lacked leadership qualities and that this deficiency contributed to its decision to discharge him (R. 835; 520–522, 525). The Company could cite no specific occasion when Shartle had displayed a shortcoming in this respect, and the Board gave no weight or credit to the conclusionary testimony in this regard (R. 835).

The incident which, according to the Company, precipitated Shartle's discharge was the discovery about three days before the discharge that Shartle was unable properly to splice a cringle on a tow line, a difficult task with which A. B. seamen are expected to be familiar, but which they are seldom called upon to perform (R. 836; 219–220, 221, 222, 514–515). The necessity for performing this type of work arises only about once in six months, and although Shartle had on one occasion prior to his employment by the Company helped a mate perform a similar task, he had never had occasion to assume the responsibility for such a job prior to the occasion in question (R. 836–837; 193–195, 200, 338). On that occasion while Shartle and his deck hand were attempting to splice the cringle, watchman Vogel, who was off duty at the time, offered to assist them (R. 836; 219, 222). Vogel had had 20 years of experience as a seaman

and was thoroughly familiar with the proper way in which to splice (R. 836; 220). While Vogel was thus assisting Shartle and showing him how properly to perform the task, First Mate Dobson appeared upon the scene and, after commenting on the fact that Shartle did not know how to perform the job, ordered both Vogel and Shartle to discontinue the job (R. 836; 194, 209, 216, 220, 501.) Instead of permitting Vogel to teach Shartle this difficult operation as Vogel had volunteered to do, and thereby helping Shartle to become a skilled and experienced A. B. seaman, First Mate Dobson assigned the task to Vogel when he later came on watch (R. 836; 220, 222, 518). The Board found that First Mate Dobson's conduct in this regard (R. 838) demonstrated that Dobson was more concerned with building up a plausible excuse for ridding the *Olds* of the ship's organizer than with acquiring an experienced A. B. seaman. When the mate discharged Shartle three days later, there was no A. B. seaman available to replace him and it became necessary for Dobson to promote a deck hand to perform Shartle's job as watchman (R. 833; 178, 502–503, 507–508). Second Mate Chrobak, who was the immediate supervisor of the deck hand after his promotion, did not know whether the deck hand had ever had any experience at splicing because no occasion requiring splicing had arisen during the remainder of the

season (R. 837; 337–338). Dobson admitted that during the preceding four years he had found A. B. seamen, other than Shartle, inexperienced at splicing and that he had not discharged them for that reason (R. 836; 514–515).

The Board noted that some of the incidents recited by the Company indicated that Shartle lacked experience and skill possessed by oldline A. B. seamen; but since the Company knew when it hired him that Shartle was at the threshold of his career as an A. B. seaman, it must have expected to train him in some respects in which its older A. B.'s were already skilled (R. 837). Third Mate Hewer conceded that although A. B. seamen like Shartle, trained at government schools, were often found to be inexperienced and unskilled, they were not discharged on that account, but were given training and instructions among other things, in the handling of equipment, in leadership, and in painting, the very respects in which Shartle was claimed to have been deficient (R. 837–838; 537–538). The Company's industrial relations manager testified that due to the difficulties in obtaining experienced crew members the Company was willing to put up with more from its men than it ordinarily might, and was even taking on "one-eyed and one-legged men" (R. 837; 664, 669, 671, 672). The Board found that the Company's failure to instruct or train Shartle, except for the limited instructions regarding operation of the modern-type electric

winches, indicated, "either that Shartle was not deficient * * * as claimed, or that [the Company] did not instruct Shartle because it desired to rid itself of him for reasons aside from the manner in which he performed his work" (R. 838).

First Mate Dobson, who discharged Shartle, manifested extreme antipathy for the Union and a determination to thwart all efforts of the union to organize seamen on the *Olds* by ridding the ship of its organizers (R. 855, 838; 172, 215–216, 218). In making the discharge, First Mate Dobson acted on his own initiative without any recommendation from Shartle's immediate superiors, Second Mate Chrobak and Third Mate Hewer, although it was the duty of those supervisors to recommend the discharge of employees under them whom they found incompetent (R. 832–833; 344, 352, 504–505, 528, 677). As shown (*supra*, pp. 11–12), it was also First Mate Dobson who stated to employee Vogel upon discovering that the latter had succeeded Shartle as the ship's organizer, "So you are the union organizer. * * * You can just pack up your clothes and get off." In view of Dobson's anti-union animus, his unsatisfactory explanation for Shartle's discharge and his attempt to discharge Vogel because of his position as ship's organizer, the Board found that Shartle was dismissed "because of his connection with and activities on behalf of the Union, and not because [he] was an incompetent employee" (R. 855).

C. OTHER ANTI-UNION STATEMENTS OF THE COMPANY CONSIDERED BY THE BOARD

In addition to the foregoing findings of interference, restraint, coercion and discrimination, *supra,* pp. 7–21, the Board also considered other statements made by the Company and its supervisory personnel. Some of these statements the Board held were not violative of the Act. Others, which were found by the Board to constitute evidence of unfair labor practices, may now be privileged under Section 8 (c) of the amended Act, *infra,* pp. 44–46, and therefore the Company is not now precluded by the Board's order from repeating such statements if it so desires.[5] However, in order to complete the picture of the evidence considered by the Board, and in view of the holding of the court below on the retroactive effect of Section 8 (c), we are setting forth herein the evidence in question.

1. The "Ferbert Letters"

In the period shortly preceding the election, when the Union's organizing campaign was at its height, A. H. Ferbert, the Company's president

[5] The Board made a similar concession to the court below, but did not, as the court implies (R. 875) concede that "the letters cannot be considered to constitute unfair labor practice." The Board contended below, as we do here, *infra,* pp. 44–46, 128–136, that the Ferbert letters and other statements were properly considered as evidence of unfair labor practices under the law in effect when it issued its decision, and that Section 8 (c) may not be applied retroactively to make such consideration improper.

(R. 803; 736, 744, 746) addressed two letters to each of the unlicensed personnel on the Company's ships (R. 803; 57, 743–746). These letters, although alleged to have been written for the purpose of acquainting the employees with the Company's neutral position, and containing declarations of neutrality, were found by the Board to have been designed to "convey the impression that collective bargaining would be fruitless" and that "the employees' selection of the Union would result in a forfeiture by the employees of their opportunities for promotion" (R. 806).

The first letter, dated May 2, 1944 (R. 805; 57, 743–744), stated "that neither the Union nor the Company has today control over what wages shall be paid. * * * wage rates * * * have been frozen by the Government * * *" (R. 805; 57, 743). Although the statement was not literally untrue, the impression it was designed to leave with the employees was that there could be no fruition to the Union's campaign promises that if designated as their bargaining representative it would obtain for the employees higher wage scales, increased overtime pay and other additional remuneration. The letter thereby implied that the employees did not need a bargaining representative. (R. 806; 108–122.) Actually the War Labor Board did permit upward wage adjustments for seamen on the Great Lakes at the instance of the union, a fact which the Company well knew (R. 806; 112), and the Company

therefore misled its employees by the choice of language used in the first "Ferbert letter" (R. 806; 110–112).

The second letter sent to all the employees by President Ferbert is dated June 1, 1944, less than 1 week before the commencement of the voting on the Company's ships (R. 804; 26, 57, 744–746). This letter pointed to the Union's "rotary hiring" policy and stated that if that policy were adopted it not only would prevent the employees from freely changing ships but also, inaccurately, that it would preclude them from obtaining higher and better paying positions even on the same ship (R. 805–806; 57, 113–117, 745). The letter also called upon the employees to study the "past record of this Union and the past record of the Company" thereby indicating as the Board found, that the employees must choose between their allegiance toward the Company and their desire for a bargaining representative (R. 828; 57, 745).

The Board found that the "Ferbert letters," when considered in context of the other violative statements and acts of the Company, were not constitutionally protected (R. 855, 828–829).

2. *The appeals to race prejudice, and other disparagement*

The Company's supervisors attempted to alienate the employees against the Union, by concerted appeal to the anti-Negro feelings of many

crew members. Thus, according to the credited testimony of seaman Lee, Captain Brinker of the *Filbert* characterized the Union as a "bunch of nigger loving bastards" and stated that if the Union won the election it would "load the ship with niggers" (R. 809; 132). Captain Brinker also told Lee, in the presence of other crew members, that if the Union won the election "I am going to hire a big nigger to be your partner and the blacker the better" (R. 809; 133).

First Assistant Engineer Anderson of the *Johnson* followed the same line, telling the employees who favored the Union "You and the CIO if you do win the election you are going to bring up a lot of goddam niggers from the Coast, and they are going to put one in every room. How would you like to eat and sleep with a nigger?" (R. 812; 282). These words were echoed by Captain Wallace who asked seaman Anderson (not related to the first assistant engineer) whether he "would like to sleep in a room with a nigger" (R. 813; 251). Second Assistant Engineer Benson of the *McGonagle* also interspersed his other anti-union statements with remarks that he did not like to sleep among "a bunch of niggers" (R. 813; 226–227), while Captain Lawless of the *Bunson* told seaman Vogt "If these lake boats are organized they will have a bunch of niggers down here and you will have to work with them" (R. 814; 85).

Captain Murray of the *Olds* told two of his seamen that "if the Union gets in here on the Lakes, you are going to be eating and sleeping with the niggers" (R. 822; 171), and told another employee, Vogel, that he would hate to give orders to Negro crewmen (R. 822; 215). On the same ship the chief engineer (whose name is not reported) told members of the crew that he was opposed to the Union because it sponsored a close working relationship between Negroes and white men (R. 822; 214).

The ships' officers did not limit themselves to the Negro issue as a basis for disparaging the Union and its organizers before the crew members. The Board found, upon the credited testimony of seaman Lee, that Captain Brinker had repeatedly stated, in profane language, that the principles of the Union members were "rotten," "they were lying bastards" and the Union itself was "no — good" (R. 809; 131). First Assistant Engineer Anderson told seaman Sims that it was foolish for the men to pay Union dues to support the Union's officers, whom he characterized as "gas hounds" and "drunks," and that "The CIO isn't going to last always, President Roosevelt isn't going to live always, and when he dies all the Jews, the God Damned Jews are going to be out and we will have a different set-up" (R. 812; 262, 281–282). Captain Lawless also told seaman Vogt that the N. M. U. and the C. I. O. were "a bunch of Communists and Jews" (R.

814; 84), and Third Mate Carr and Third Assistant Engineer Scharmin repeatedly advised the crew that the Union's officials were agitators and Communists (R. 815; 86–87).

The Board found the statements set forth above, *supra,* pp. 24–27 when considered in the context of all the other unfair labor practices perpetrated by the Company and its supervisory personnel, "constituted an integral part of the [Company's] broad pattern of coercive conduct" (R. 826–828).

II

THE BOARD'S CONCLUSIONS AND ORDER

The Board, after carefully reviewing the record and the intermediate report of the Trial Examiner, and after considering the exceptions, briefs and oral argument, concluded that the findings and conclusions of the Trial Examiner were free from serious error. The Board specifically agreed with the Trial Examiner as to the import of the "Ferbert letters," finding that, although they were not unlawful *per se,* when considered in the context of the Company's other illegal acts and statements they "assume[d] a coercive character which is not privileged by the right of free speech" (R. 855). Further, in finding that the discharge of Shartle was motivated by anti-union animus, the Board noted the fact that First Mate Dobson attempted to discharge Vogel upon learning that the latter had replaced Shartle

as ship's organizer (R. 855)—a consideration to which the Trial Examiner had not adverted in his statement of his conclusions respecting Shartle's discharge. The Board also corrected an error in the intermediate report wherein the Trial Examiner had stated that Seaman Lee had not solicited Seaman McGuiness to join the Union (R. 808, n. 8), when in fact McGuiness had testified that Lee had asked him to do so (R. 855). With these corrections and additions it adopted the findings, conclusions and recommendations of the Trial Examiner without repeating them in its own decision (R. 854–855).

The findings, summarized above, *supra,* pp. 4–27, were to a considerable extent based upon testimony of Board witnesses which was either undenied, admitted, or substantially corroborated by the Company's own witnesses. Where findings were based upon a resolution of the credibility of contradictory witnesses, the Board relied upon the Trial Examiner's carefully explained resolutions of such conflicts in the evidence, since he had observed the witnesses and heard their testimony, and since the Board found *no* basis for deciding that the determinations as to credibility were improper.

Upon the findings so made the Board concluded that the Company had engaged in a course of conduct designed to interfere with, restrain and coerce its employees in violation of Section 8 (1) of the Act (R. 823–830, 855), and had dis-

criminatorily discharged Howard Shartle because of his activity as a Union organizer, in violation of Section 8 (3) and (1) of the Act (R. 838–839, 855). The Board therefore issued its order directing the Company to cease and desist from discouraging membership in the Union or any other labor organization, and from in any other manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed them under Section 7 of the Act; to offer reinstatement to the discriminatorily discharged employee, Howard Shartle, and make him whole for any loss of wages; and to post the usual compliance notices on each of its ships (R. 856–857). The subsequent proceedings during the time of judicial review have been described at pp. 3–5, *supra*.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Taft-Hartley Act and the Administrative Procedure Act have changed the scope of judicial review of orders of the National Labor Relations Board.

2. In holding that the procedural changes made by Sections 8 (c), 10 (b), and 10 (c) of the Taft-Hartley Act, and Section 7 (c) of the Administrative Procedure Act are applicable to Board proceedings and decisions made prior to the effective date of these statutes.

3. In substituting for the Board's findings concerning the credibility of witnesses, weight of evidence and inferences therefrom, contrary findings of its own.

4. In failing to accept as the law of the case the holding of this Court that the Board's determinations as to the credibility of witnesses were valid and proper.

5. In holding that the Board's findings are not supported by substantial evidence on the record considered as a whole.

6. In seemingly holding that the company could not be charged with responsibility for the acts of officers on 7 out of 73 ships unless that conduct could be traced to a policy of the central management.

7. In not enforcing the order of the Board.

SUMMARY OF ARGUMENT

I

Inasmuch as the proceeding before the Board was concluded before either the Administrative Procedure Act or the Labor Management Relations Act became effective, the provisions of those statutes relating to Board procedure and the admissibility of evidence are applicable "only to the extent that the procedural steps dealt with have not yet been taken". Congress did not intend to reach back and nullify prior proceedings. This is not only the well established general rule

of statutory construction, but is supported by all decisions under the statutes in question (except that in the instant case), by the terms of the statutes, and by the rejection by Congress of a proposal to make the Labor Management Relations Act applicable to pending cases. The result is that the new statutes control the scope of judicial review, which is taking place after their enactment, but that the Board's order cannot be overturned for failure to adhere to procedural provisions not in effect when it was entered.

The only change in substantive law relates to the illegality of the Ferbert letters. The Board has conceded that, in view of Section 8 (c) of the new statute, such letters are not now unlawful and their repetition in the future not enjoinable.

II

A. The Administrative Procedure Act and the Labor Management Relations Act provide that the Board's findings shall be conclusive "if supported by substantial evidence on the record considered as a whole." Although the word "substantial" was not contained in the 1935 National Labor Relations Act, the courts uniformly held that "substantial" evidence was necessary to sustain a Board finding. The phrase "on the record considered as a whole" was added because some persons thought that the substantial evidence rule permitted the courts to look only at

the excerpts from the record supporting one side of the case. But the rule has never been so limited. The earliest cases in this court (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229; *National Labor Relations Board* v. *Columbian Enameling and Stamping Co.*, 306 U. S. 292, 299–300), and in the courts of appeals assimilated the scope of review under the substantial evidence test to that governing direction of a verdict in jury cases, as to which it was clear that the court would consider the whole record to determine whether a reasonable man might reach the particular conclusion. And this Court's decisions under the National Labor Relations Act demonstrate that it has "not confined [itself] to the scope of the Board's view of the case, and [has] examined all the evidence." *National Labor Relations Board* v. *Indiana & Michigan Electric Company*, 318 U. S. 9, 17, especially.

Since the test of reasonableness announced in the *Consolidated Edison* case required consideration of the record as a whole, the new statutes did not change the scope of review. Apart from the decision below, every court of appeals which has passed upon the question—seven in all—has so concluded.

B. The history of the Administrative Procedure and the Labor Management Relations Acts confirms this conclusion. It shows that when the former was passed its draftsmen recognized that

the scope of review was not being changed, but only clarified to resolve the doubts held by some persons as to whether the substantial evidence test required examination of the record as a whole. The Labor Management Relations Act in terms unquestionably adopts the same rule as the Administrative Procedure Act. The history of the later statute shows that the majority of the Senate Committee which was responsible for the language contained in the Act intended that the rule under the two statutes be the same, and succeeded in defeating proposals by the House and a minority of the Senate Committee which would clearly have had the effect of enlarging the scope of review. It is true that a number of members of Congress, including the House conferees on the Labor Management Relations Act and Senator Taft, made statements that the scope of review was being broadened. But this resulted from the fact that they were not fully familiar with, or had not properly analyzed, the decisions of this Court and of the courts of appeals, and thus incorrectly assumed that the prior scope of review was narrower than it really was. This mistaken impression, however, obviously does not provide an adequate basis for giving an expanded meaning to the expressions used. The most that can be said is that such statements make "the legislative history * * * more conflicting than the

text is ambiguous." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49.

C. The court below mistakenly regarded other sections of the two statutes as enlarging the scope of judicial review. But these provisions—that the Board should decide cases on the preponderance of the evidence (Section 10 (c), Labor Management Relations Act), and that the Board must observe the rules of evidence (Section 10 (b) Labor Management Relations Act) and decide "in accordance with the reliable, probative, and substantial evidence" (Section 7 (c) Administrative Procedure Act)—govern the conduct of the Board in making decisions initially, not the functions of the reviewing court, which are defined in Section 10 (e) of both acts.

III

A. In its prior opinion in this case, this Court indicated that the Board's findings were supported by substantial evidence under the test of the *Consolidated Edison* case. If, as we have argued, the scope of review has not been enlarged by the recent legislation, the prior decision is controlling here and there is no need to re-examine the evidence. But even if it be assumed that the present standard of review is somewhat broader, the findings of the Board are adequately supported.

B. In concluding that the Board's findings were supported by insufficient evidence, the court

below examined the evidence *de novo,* substituted its views as to the credibility of witnesses for those of the Board, and held that the acts of the ship's officers were not properly attributable to the company. With respect to credibility and company responsibility, the decision is inconsistent with this Court's prior decision. The law as to company responsibility for the acts of supervisory officers has not been changed by the new legislation. Nor does any standard of appellate review permit the reviewing court to substitute its decision for that of the original fact finder with respect to the credibility of witnesses—particularly when this Court has described the "evaluation of the facts" as "thoughtful and discriminating." 337 U. S. at 660. Furthermore, even on the assumption that the scope of review has been enlarged, it is clear that Congress did not intend the reviewing court to substitute its judgment *de novo* on the facts for that of the Board. And yet it is apparent that that is precisely what the court below has done.

C. It is clear from its opinion that the court below did not accept the Board's conclusion as to the credibility of witnesses and that it chose to believe the company's witnesses rather than the Board's whenever there was a difference of consequence. As has been indicated, this was not the function of the reviewing court, unless it could conclude that on the record as a whole no reasonable fact finder could have found as did

the Board. In this case, on the contrary, examination of the record will show that on two of the seven ships covered by the Board's findings—the *Johnson* and the *McGonagle*—the testimony relied upon by the Board was uncontradicted. On each of the other five ships the record clearly discloses that one or more of the chief officers was not testifying honestly and candidly. The only thing out of the ordinary in this case, with respect to the matter of credibility, is the number of Company witnesses whose lack of veracity can be determined from the printed record.

D. The court below erred in finding that the Board's decision rested upon hearsay and incompetent testimony. The Board did not rely on the hearsay statements by Shartle referred to by the court, and the mere admission of such testimony is not ground for reversal. Statements by ship officers to seamen as to an intention to discharge a seaman other than the listener for union activity and as to efforts of another company officer to discharge a union organizer are not inadmissible as hearsay, since the fact of the making of the statements, apart from their truth, would exert pressure upon the employees. In any event, since the hearing was held before the enactment of the 1947 Act, the Board was not bound to observe the rules of evidence applied by the courts as long as its findings are supported "by the kind of evi-

dence on which responsible persons are accustomed to rely in serious affairs." *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 873 (C. A. 2), certiorari denied, 304 U. S. 576.

E. The company is responsible for the conduct of the officers of its vessels, whether or not their acts are traced to orders from the central management, and irrespective of whether that management was aware of their conduct or had given the officers instructions to be neutral. To the seamen, the officers are the company. The men cannot be expected to assume that the officers are disregarding orders from company headquarters, particularly when no such instructions to the officers are communicated to the men. The Ferbert letters, even with their declarations of neutrality, plainly manifested the company's opposition to the union, and the anti-union conduct of the officers would naturally have been regarded by the men as a part of a company campaign against the union. The similarity of the activity of the officers on the seven ships as to which testimony was taken also supports the Board's finding that the officers' conduct was tied in with the policies of the company. The fact that no testimony was adduced as to the other 66 vessels operated by the company clearly does not relieve it of responsibility.

ARGUMENT

I

THE ADMINISTRATIVE PROCEDURE ACT AND THE LABOR MANAGEMENT RELATIONS ACT DO NOT APPLY RETROACTIVELY TO THE COMPLETED PROCEDURES OF THIS CASE

In its opinion in this case in June, 1949 (337 U. S. 656, 661), this Court held that the case should be remanded to determine "whether the Administrative Procedure Act * * * and the Taft-Hartley Act * * *, enacted between issuance of the Board's order and the Court of Appeals' decision, are applicable to and, if applicable, in any way affect Board procedures and the scope of judicial review of Board orders. On the remand the court below held those statutes applicable in all respects to the present case, just as if they had been in effect when the proceeding was instituted.

The proceeding before the Board terminated with the Board's decision of August 13, 1946, before the Administrative Procedure Act[6] became effective, and before the Taft-Hartley Act was passed.[7] Judicial review of the Board's decision

[6] The Procedure Act was approved on June 11, 1946, 60 Stat. 237, 5 U. S. C. 1001. Various provisions became effective three, six and twelve months later, all after August 13, 1946. See Section 12, 5 U. S. C. 1011.

[7] The Taft-Hartley Act was enacted on June 23, 1947, and became effective on August 22, 1947. 61 Stat. 136, 29 U. S. C., Supp. II, 141.

is taking place, of course, after those statutes have gone into effect.

A. THE PROCEDURAL PROVISIONS; ONLY THE SCOPE OF JUDICIAL REVIEW IS GOVERNED BY THE NEW STATUTES

In addition to the provisions for judicial review, as to the applicability of which the parties are not in dispute, the court below held applicable to the instant case various other provisions of the Administrative Procedure Act and the Labor Management Relations Act relating to the admission of evidence before the Board and evidentiary standards to be applied by the Board. The sentence in Section 7 (c) of the Administrative Procedure Act invoked by the court below provides that agencies must consider "the whole record," and that orders must be issued only when supported by and in accordance with "reliable, probative and substantial evidence."[8] The court also referred to Sections 10 (b) and (c) and 8 (c) of the Labor Management Relations Act. Section 10 (b) requires that Board proceedings "so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States." Section

[8] "Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence."

10 (c) requires the Board to act "upon the preponderance of the testimony taken." Section 8 (c) of the Taft-Hartley Act provides that:

> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not * * * *be evidence* of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit. [Italics added.]

Of these provisions, certainly Section 7 (c) of the Procedure Act and Section 10 (c) of the Labor Management Relations Act did not change existing law. But in any event, none of these provisions apply to proceedings completed before the statutes went into effect.

With respect to procedural changes, all decisions except that of the court below in the instant case have held that "Insofar as Congress amended certain procedural provisions of the Act it reflected no intention to reach back and nullify procedural steps already taken. Those steps already taken, pleadings, and all things done under the old law must stand. Procedural changes operate in the future." *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 238 (C. A. 8), certiorari denied, 334 U. S. 845. "The changes or amendments * * * are procedural changes which, accord-

ing to the well-established rule, are applicable to pending cases only to the extent that the procedural steps dealt with have not yet been taken." *National Labor Relations Board* v. *Whittenberg,* 165 F. 2d 102, 104 (C. A. 5). Sutherland, *Statutory Construction* (3d Ed., 1943), Vol. 1, p. 438, 2 *id.* 136, states the rule as follows:

> When a statute affecting procedure is amended while a suit is pending, the provisions added by amendment are applicable only to proceedings taken after the amendment and not to proceedings taken prior thereto.
>
> * * * where a new statute deals with procedure only, prima facie it applies to all actions—to those which have accrued or are pending, and to future actions. But the steps already taken, the pleadings, and all things done under the old law will stand, unless an intent to the contrary is plainly manifest.

This rule has been accepted and applied by the Second, Third, Fifth, Eighth and Tenth Circuits, and even by the Sixth Circuit itself in a prior case. *National Labor Relations Board* v. *Mylan-Sparta Co.,* 166 F. 2d 485, 488 (C. A. 6) in which the court stated that "the Act is prospective, not retroactive, in its effect." See in addition to the cases quoted above. *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works,* 165 F. 2d 660, 662 (C. A. 2); *National Labor Relations Board* v.

Brozen, 166 F. 2d 812, 813 (C. A. 2); *National Labor Relations Board* v. *Clark*, 176 F. 2d 341, 343 (C. A. 3); *National Labor Relations Board* v. *Gate City Cotton Mills*, 167 F. 2d 647, 649 (C. A. 5); *National Labor Relations Board* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504, 506–507 (C. A. 5); *National Labor Relations Board* v. *Piedmont Cotton Mills*, 179 F. 2d 345, 346 (C. A. 5); *National Labor Relations Board* v. *Fulton Bag & Cotton Mills*, 180 F. 2d 68, 72 (C. A. 10).

That these general principles were intended to be applicable is confirmed both by the provisions and the history of the Administrative Procedure Act and the Taft-Hartley Act, for, in each, Congress made specific provision that they should not be applied retroactively. Section 12 of the Administrative Procedure Act provides in part:

> This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, * * *, and *no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.* [Italics supplied.]

The language of the Taft-Hartley Act, when read in the light of the legislative history,[9] also shows that Congress did not intend to give the amendments retroactive effect. Section 104 pro-

[9] Compiled in *Legislative History of the Labor Management Relations Act, 1947* (Gov't. Printing Office, 1948).

vides that "The amendments made by this title shall take effect sixty days after the date of the enactment of this Act [i. e. August 22, 1947] * * *." Section 102 (c) of the House bill,[10] which would have had the effect of precluding the Board and the courts from considering any matters deemed to be violations of the Wagner Act (such as the Ferbert letters) unless such matters continued to be unfair labor practices under the amendments, was deliberately rejected in conference.[11]

The application of these principles to the instant case results in the scope of judicial review being controlled by the subsequent statutes, since the judicial review takes place after the effective dates of the new legislation. It also means, however, that the validity of the Board's decision must be tested, under the "new" scope of review, by the law in effect at the time the Board acted. A decision cannot be reversed because of the Board's failure to observe procedural or evidentiary requirements not then in existence. Even if the scope of review has been enlarged, which we deny, this would not mean that the reviewing court could with propriety test what the Board did on the basis of legal provisions not in effect at the time the Board acted.

The court below, however, has held that all of the above provisions of the Administrative

[10] H. R. 3020, 80th Cong., 1st sess., *id.* at pp. 82, 209.

[11] *Id.* at p. 565.

Procedure and Taft-Hartley Acts are applicable to this case. In so concluding its decision is inconsistent with all of the foregoing authorities and principles.

B. SUBSEQUENT CHANGES IN SUBSTANTIVE LAW DO NOT AFFECT THE VALIDITY OF A BOARD ORDER, BUT, AT MOST, LIMIT THE *IN FUTURO* EFFECT OF THE CEASE AND DESIST ORDER

The only change in substantive law involved in this case relates to Section 8 (c) of the Taft-Hartley Act and its effect upon the Board's treatment of the Ferbert letters.[12] Section 8 (c), in addition to the evidentiary provision quoted above, also provides that the expressions therein described "shall not constitute" an unfair labor practice.

The general rules which govern in determining whether a statute applies to prior transactions are well established. In view of the general savings statute, 1 U. S. C. (Supp. II, 1948) 109, (previously 1 U. S. C. 29), changes in substantive law are not retroactive, unless the legislature specifically so declares. *United States* v. *Reisinger,* 128 U. S. 398, 403; *Hertz* v. *Woodman,* 218 U. S. 205, 218; *Great Northern Ry. Co.* v. *United States,* 208 U. S. 452, 465. Nevertheless,

[12] The court below (R. 871, 880) also referred to Section 10 (c), which states that "no order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back payment, if such individual was suspended or discharged for cause." Clearly, this provision merely reaffirms preexisting law. *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969, 974 (C. A. 4).

although liabilities previously incurred are not destroyed (such as liability for reinstatement and back pay [13]) (*ibid.*), conduct not unlawful under new legislation cannot continue to be enjoined *in futuro*. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 431–432; *Ziffrin* v. *United States*, 318 U. S. 73, 78; *Public Utilities Comm. of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 466; *Texas Company* v. *Brown*, 258 U. S. 466. In recognition of this fact, the Board has consistently conceded, and the courts have held,[14] that a court cannot by way of enforcing the Board's order issue an injunction which will restrain in the future conduct which is no longer illegal under the 1947 Act.

Apart from this effect of substantive changes upon orders operating *in futuro*, the general savings statute requires that as to conduct which occurred prior to the amendments the original Act must "be treated as still remaining in force." [15]

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[13] This question will be discussed in the brief for the Board in *Universal Camera Corp.* v. *National Labor Relations Board*, No. 40, this Term.

[14] *L. A. Young Spring & Wire Corp.* v. *National Labor Relations Board*, 163 F. 2d 905 (C. A. D. C.), certiorari denied, *sub nom. Foreman's Ass'n of America* v. *L. A. Young Spring & Wire Corp.*, 333 U. S. 837; *National Labor Relations Board* v. *Budd Mfg. Co.*, 169 F. 2d 571 (C. A. 6), certiorari denied, 335 U. S. 908; *National Labor Relations Board* v. *Brozen*, 166 F. 2d 812 (C. A. 2).

[15] *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 236–238 (C. A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Gate City Cot-*

In view of these principles, the Board has reorganized that in view of the new Section 8 (c) any order operating *in futuro* could not restrain the repetition of such statements as were contained in the Ferbert letters. Since nothing else turns on whether such letters were unfair labor practices when they were written, that question is now academic. That does not mean, however, that at the time of the Board's hearing and decision, it was improper for the Board to treat the letters in their factual context *as evidence* of the other unfair labor practices found.

Conclusion. In summary, the new statutes are applicable in the instant case only to the extent that they prescribe the scope of judicial review, and insofar as the changes in substantive law might exempt certain types of utterances from the injunctive provisions of the Board's order. In all other respects the new statutes are inapplicable.

Since the new statutes determine the scope of judicial review, it becomes necessary to consider whether the scope of review has been changed.[16]

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ton Mills, 167 F. 2d 647, 649 (C. A. 5); *National Labor Relations Board* v. *Piedmont Cotton Mills*, 179 F. 2d 345, 346 (C. A. 5); *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131, 137 (C. A. 4); *Lovely* v. *United States*, 175 F. 2d 312, 316 (C. A. 4); *National Labor Relations Board* v. *Mylan-Sparta Co.*, 166 F. 2d 485, 488 (C. A. 6); *National Labor Relations Board* v. *Budd Mfg. Co.*, 169 F. 2d 571, 575 (C. A. 6), certiorari denied, 335 U. S. 908.

[16] The opinion below states that "The Board concedes that the review in this Court is controlled by the two statutes"

II

THE SCOPE OF JUDICIAL REVIEW OF BOARD FINDINGS OF FACT HAS NOT BEEN CHANGED BY THE ADMINISTRATIVE PROCEDURE ACT OR THE LABOR MANAGEMENT RELATIONS ACT

INTRODUCTION

As has been pointed out, this Court stated in its previous opinion in this case that "without doubting the existence here of evidence substantial enough under the Wagner Act, *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 229, to warrant the Board's findings, we are not certain whether that standard controls this case." 337 U. S. at 661. This would seem clearly to mean that, tested by the scope of review enunciated in the *Consolidated Edison* case, the evidence is sufficient to support the Board's findings and conclusions that the Company violated Sections 8 (1) and (3) of the Act.

The fact that Mr. Justice Jackson alone reserved opinion "as to the sufficiency of the evidence under the Wagner Act" (337 U. S. at 662) indicates that the other members of the Court were satisfied on this point. Having expressed this view after a "careful scrutiny of the record," and after coming to the conclusion that "the

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(R. 870). Since the Board's concession, as stated in the brief and argument below, was the same as that set forth above, the court's statement presumably relates only to the scope of judicial review.

printed transcript suggests thoughtful and discriminating evaluation of the facts" by the Trial Examiner, we think it clear that this Court did not leave open the question whether, assuming that the scope of review has not been changed, the Board's findings and conclusions should be sustained. Since, unless the scope of review has been changed, the Board's order should now be enforced, we shall first discuss the question whether the new statutes have broadened the scope of judicial review. We will then analyze the decision of the court below and the evidence in the case, in support of our further position (Point III, *infra*), that even if the scope of review has changed the Board's findings and conclusions are valid and should have been sustained.

A. THE NEW STATUTES ON THEIR FACE DO NOT ALTER BUT MERELY RESTATE THE SUBSTANTIAL EVIDENCE RULE

It is the Government's position that the language of the relevant provisions of the Taft-Hartley Act and the Administrative Procedure Act dealing with scope of judicial review clearly and unambiguously embody the same standard of review which theretofore existed under Section 10 (e) of the Wagner Act. As we shall show below, every other court of appeals which has passed upon the question—seven under the Taft-Hartley Act and four upon the Administrative Procedure Act—have so held. See pp. 83–91, *infra*.

1. THE REQUIREMENT THAT THE EVIDENCE BE "SUBSTANTIAL" IS NOT NEW

The Wagner Act provided that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive." Section 10 (e). In the *Consolidated Edison* case, 305 U. S., at 229, this Court held that the word "evidence" in this context meant "substantial evidence."

Section 10 (e) of the Administrative Procedure Act provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *; (5) unsupported by substantial evidence * * *. In making the foregoing determinations the courts shall review the whole record or such portions thereof as may be cited by any parties, and due account shall be taken of the rule of prejudicial error."

Section 10 (e) of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 provides that the Board's findings, "if supported by substantial evidence on the record considered as a whole shall be conclusive."

Both the Procedure Act and the Labor Management Relations Act add the word "substantial" to the term "evidence" as used in the original act. Inasmuch as it had uniformly been

held since the very first cases under the 1935 Act, *Washington, V. & M. Coach Co.* v. *National Labor Relations Board,* 301 U. S. 142, 147, that the test was "substantial evidence", this addition clearly made no change in the scope of review and was merely declaratory of existing law. E. g. *National Labor Relations Board* v. *Universal Camera Corp.,* 179 F. 2d 749, 752 (C. A. 2), certiorari granted, 339 U. S. 962, No. 40, this Term.

2. The Requirement That Substantiality Be Determined Upon Consideration of the Record as a Whole Does Not Change the Scope of Review

The only other change made by the two recent statutes is the explicit requirement that the substantiality of the evidence be determined "on the record considered as a whole." Although the language of the Procedure Act and of the Labor Management Relations Act is not *in haec verba,* the words used are so similar as to make clear that they have the same meaning.

It is the Government's position that the "substantial evidence" rule never limited the reviewing court to looking at only a part of the evidence in the record, and indeed, that its application always contemplated examination of the record as a whole. As we shall show, the words "on the record as a whole" were added for clarifying purposes because of a misconception by some persons as to the true meaning of the prior rule.

The leading cases defining the substantial evidence rule, *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 229, and *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, 299–300, both declare that "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." In support of this statement, the *Consolidated Edison* case cited three opinions of the Courts of Appeals. The first of these, *Appalachian Elec. Power Co.* v. *National Labor Relations Board,* 93 F. 2d 985, 989 (C. A. 4), stated that the rule as to substantiality was the same as that "applied in reviewing the refusal to direct a verdict at law." The second case cited was *National Labor Relations Board* v. *Thompson Products,* 97 F. 2d 13, 15 (C. A. 6). The court there said:

> "Substantial evidence" means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a *quality of proof which induces conviction and makes an impression on reason.* It means that the one *weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom* and, considering them in their entirety and relation to each other,

> arrives at a fixed conviction. [Italics supplied.]

This language makes it clear that the reasonableness of fact findings is to be determined on the basis of the entire record. The third case, *Balston-Stillwater Co.* v. *National Labor Relations Board,* 98 F. 2d 758, 760 (C. A. 2), cited and relied upon the *Appalachian Power* and *Thompson* cases. See also, *National Labor Relations Board* v. *Union Pacific Stages,* 99 F. 2d 153, 177 (C. A. 9), in which the court, following the *Appalachian Power* and *Thompson* cases, stated:

> But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.

In the *Columbian* case, after citing the same decisions and quoting from the *Consolidated Edison* case, this Court expressly accepted the jury analogy contained in the Fourth Circuit's decision in the *Appalachian Power* case, saying:

> Substantial evidence * * * must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

The jury analogy used in the *Columbian* case in amplification of the *Consolidated Edison* formula is an enlightening one. The test applied

in reviewing jury cases has been well stated in *Sandri* v. *Byram,* 30 F. 2d 784, 786 (C. A. 6):

> If, after a survey of the evidence, and after giving effect to every inference to be fairly or reasonably drawn from it in plaintiff's favor, there is no substantial evidence of negligence, the case is one for the judge. But if, *upon a consideration of all the proven facts and circumstances,* together with all proper inferences and deductions therefrom, *reasonable men might fairly differ* upon the vital point as to whether Dickinson was in the exercise of due care, then the question becomes one for the jury. These are elementary principles and need no citations of authority. [Italics supplied.]

See also the decision of the Court of Appeals for the District of Columbia Circuit, speaking through Mr. Justice Rutledge in *Christie* v. *Callahan,* 124 F. 2d 825, 826–827. The other cases cited in the *Columbian* case—*Baltimore & O. R. R. Co.* v. *Groeger,* 266 U. S. 521, 524, and *Gunning* v. *Cooley,* 281 U. S. 90, 93–94—though not quite as explicit as the cases just referred to, also indicate their view that the sufficiency of the evidence supporting a jury's verdict is to be determined on the whole record. The jury analogy invoked in the *Columbian* case is therefore persuasive evidence that the review of administrative findings is of the same character.

That the substantial evidence rule properly interpreted embodied a standard of reasonable-

ness on the whole record was the view advanced before a congressional committee by Dean Stason, who participated in the activities which eventuated in the Administrative Procedure Act. He testified that, although the meaning of substantial evidence had been variously stated:

> One of the intermediate positions, and probably *the most generally accepted meaning* ascribed to the term "substantial evidence" is this: The term "substantial evidence" is construed to confer finality upon an administrative decision on the facts when, *upon an examination of the entire record,* the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision. On the other hand, if a reasonable man, acting reasonably, could not have reached the decision upon the evidence and the inferences therefrom, then the decision is not supported by substantial evidence, and it should be set aside.[17] [Italics supplied.]

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[17] Hearings before Subcommittee of Senate Judiciary Committee on Administrative Procedure, 77th Cong., 1st Sess., S. 674, S. 675, S. 918, p. 1356. Dean Stason has expressed the same thought in substantially the same language in his article "*Substantial Evidence*" *in Administrative Law*, 89 Univ. of Penn. Law Rev. 1026, 1038, and see 1035–1050 (1941), written about the same time. One of the writers of this brief had expressed similar views in an article written before the enactment of the Administrative Procedure Act. Stern, *Review of Findings of Administrators, Judges and Juries*, 58 Harv. L. Rev. 70, 77–78 (1944).

This we think to be an accurate formulation of the rule of the *Consolidated Edison* case, as well as of the test under the new legislation.

Subsequent decisions of this Court have not even intimated that the scope of review was anything different from that stated in the *Consolidated Edison* and *Columbian* cases. The reference to the *Consolidated Edison* case in the prior opinion in the instant case (337 U. S., at 661) shows that the former is still regarded as defining the scope of review under the Wagner Act.

Examination of this Court's decisions demonstrates that it has always looked not merely at a part but at the record as a whole, in determining whether the Board's findings were substantially supported. The statement in *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 17, that, "We have not confined ourselves to the scope of the Board's view of the case, and have examined all the evidence in the certified transcript, and not merely the evidence set forth in the printed record," establishes this fact beyond a doubt. In the same case, this Court specifically referred to the provision of Section 10 (e) of the Wagner Act which required the Board to certify to the reviewing court "a transcript of the entire record in the proceeding, including the pleadings and testimony." The requirement that the Board certify the entire record to the reviewing court itself establishes

that Congress did not intend to restrict judicial review under the Wagner Act merely to excerpts from the testimony supporting the Board's findings.[18]

Other decisions of this Court, showing that the Court has looked at the record as a whole, are: *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350 ("the entire evidence, pro and con"); *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 339, 341 ("entire and uncontradicted evidence of record"); *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588 ("the whole congeries of facts"); *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479 ("the whole course of conduct revealed by this record"); *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31, 38 ("an examination of the record").[19] Compare, *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 237–238. And the *per curiam* decisions of the Court in *National Labor*

[18] The Court noted that (318 U. S. at 13):

"While the Board did not designate all of the testimony for printing, it has certified it all to us, it has stricken no testimony or any witness in question from the record and has made no finding that any specific parts of it were not relied upon."

[19] See also, *National Labor Relations Board* v. *Southern Bell Telephone Co.*, 319 U. S. 50, 58, 59; *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 800, 801.

Relations Board v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282, and *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, each stating that upon "examination of the record" the Board's findings were supported by substantial evidence, could not have been intended to change the recognized standard of review, or to intimate that "the record" which was examined was really not the record as a whole but only a part thereof.

National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U. S. 206, and *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, referred to by Dean Stason at the hearing cited above (at pp. 1355–1356), do not manifest any departure from the prevailing rule. The recital of the evidence in each opinion included the testimony of company witnesses. The Board argued in the *Waterman* case that there was "clear and overwhelming proof" of violation (309 U. S., at 208), not that selected portions of the evidence showed a violation. (See also, 309 U. S., at 226.) In the *Bradford* case the Court noted that it had "carefully scrutinized this entire record" (310 U. S., at 343). These cases there re cannot be regarded as departures *sub silentio* from the previous doctrine.[20]

[20] Dean Stason has conceded that "possibly the language in these recent cases is fortuitous rather than indicative of a trend in establishing a new definition of substantial evidence.

Accordingly, it is our view that the test of reasonableness articulated in the *Consolidated Edison* and *Columbian Enameling* cases necessarily required perusal of the record as a whole, and thus was no different from the test contained in the new statutes.

Since, under the rule of the *Consolidated Edison* case, the test was whether the Board's decision was supported by substantial evidence on the record as a whole, as we have shown it was, plainly the new statutes adding those words made no substantive change. This is true even though the amendment may have removed doubt in the minds of some persons who, because of a lack of explicit pronouncement in this Court's opinions and a failure to analyze the cases correctly, were not certain as to the scope of review under the earlier Acts. The fact that the additional words may have clarified the question for those in doubt does not mean that there was a change in the test to be applied. We submit, therefore, that it is clear from the text of the review provisions of the Administrative Procedure Act and the Taft-Hartley Act read in the light of the prior authorities that the scope of review has not been altered.

Everything considered, the interpretation of the earlier cases seems the wiser." Stason, "*Substantial Evidence*" *in Administrative Law*, 89 Univ. of Penna. Law Rev. 1026, 1050 (1941). See also, Davis, *Scope of Review of Federal Administrative Action*, 50 Col. L. Rev. 559, 602.

B. THE LEGISLATIVE HISTORY OF THE NEW STATUTES SHOWS THAT CONGRESS REJECTED BROADER STANDARDS OF JUDICIAL REVIEW

The court below relied on excerpts from the legislative history of the Taft-Hartley Act as proof that a broader review was intended. We believe that an examination of the full history of both of the pertinent statutes will confirm what the text of the law shows, that Congress intended to clarify but not to change the scope of review of Board orders. The legislative history demonstrates that Congress rejected proposals to expand the scope of review by substituting for the substantial evidence rule tests which would have accorded more latitude to reviewing courts. In any event, any ambiguity in the legislative history resulting from the excerpts relied upon by the court below and by respondent are not such as to overcome the fact that the words of the statutes do not depart from the pre-existing rule.

1. THE ADMINISTRATIVE PROCEDURE ACT

The first predecessor of the Administrative Procedure Act was the Logan-Walter bill, passed by Congress but vetoed by the President in 1940.[21] As it passed the House, that bill permitted administrative findings to be set aside if the reviewing court concluded "(1) that the findings of fact are clearly erroneous; or (2) that the findings of fact

[21] H. R. 6324, 76th Cong., 3d Sess., 86 Cong. Rec. 4742–4744, 13748, 13942–13945, 13953.

are not supported by substantial evidence * * *." 86 Cong. Rec. 4669. The "clearly erroneous" clause was deleted by the Senate "on the ground that it would permit courts to review the evidence and substitute their own independent views of the facts * * *,"[22] and the House concurred in the Senate amendment despite objections on the floor.[23] The debate clearly indicates that Congress was aware that the "substantial evidence" test was a narrower one than the "clearly erroneous" rule. See *United States* v. *Gypsum Co.*, 333 U. S. 364, 395; *District of Columbia* v. *Pace*, 320 U. S. 698.

After the veto of the Logan-Walter bill, a minority of the Attorney General's Committee on Administrative Procedure—Messrs. McFarland, Stason and Vanderbilt—reported that "one of the prevalent interpretations of the 'substantial evidence' rule permitted the courts only to look to the evidence on one side of the case," and recommended that "the court should set aside decisions *clearly* contrary to the *manifest* weight of the evidence."[24]

The proposals which eventuated in the Administrative Procedure Act were renewed in 1945.[25]

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[22] *Id.*, at 13676, 13746.

[23] *Id.*, at 13809, 13815–13816.

[24] Final Report of the Attorney General's Committee on Administrative Procedure (1941), pp. 210–211.

[25] Hearings had been held in 1941 at which Dean Stason gave the testimony quoted at p. 54, *supra*.

A draft of the bill was explained to the House Judiciary Committee by Mr. McFarland, the Chairman of the American Bar Association Committee on Administrative Law. In his testimony Mr. McFarland stated:[28]

> The word "substantial" is a perfectly good word. If people do not give it its due weight, that is their fault. I do not think you can improve on that language.
>
> The other rule that is so often discussed is the preponderance-of-evidence rule, or the weight-of-evidence rule. But the difficulty there is that it would cause about as much difficulty as help.
>
> * * * * *
>
> Mr. CRAVENS. I think what we are trying to find out is, in your judgment, based on your experience, is judicial review adequate which is based upon a finding by the reviewing court that there was substantial evidence to support the facts as found by the agency below?
>
> Mr. MCFARLAND. That is right. That does not mean, as we sometimes hear it said, that they look only to certain pages of the record. You might have in the record something which would sustain the judgment; on the other hand, there might

[28] The legislative history of the Administrative Procedure Act has been compiled in Senate Document No. 248, 79th Cong., 2d Sess., copies of which will be made available to the Court. It seems more convenient to cite this document for the history of the statute than to refer to the official citations.

be incontrovertible evidence in the remainder of the record which utterly destroys it. The review must be of the whole record in the sense that any part of the record can be called upon.

Mr. WALTER. What do you think of the scope of review in H. R. 1206, at page 53 of the bill?[27]

Mr. MCFARLAND. *I should say that reflected the present judicial rule.*[28] [Italics supplied.]

The bill reported out by the Senate Committee was in the form in which it finally passed. The Senate Committee Report (S. Report 752, 79th Cong., 1st Sess.) declared with respect to the review provision:

> "Substantial evidence" means evidence which on the whole record is clearly substantial, sufficient to support a finding or conclusion under Section 7 (c), and material to the issues.
>
> * * * * *
>
> The requirement of review upon "the whole record" means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case.[29]

The Report continued:

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[27] The relevant provisions of Section 10 (e) of H. R. 1206 were substantially the same as those finally enacted. See Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 8–9, 176.

[28] Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 85–86.

[29] *Id.*, at p. 214.

> The "substantial evidence" rule set forth in section 10 (e) is exceedingly important. As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law.[30]

The Senate Report, after noting that the bill had been prepared by representatives both of private parties and private organizations and of the Attorney General, stated that "the Attorney General's favorable report on the bill, as revised, is set forth in Appendix B."[31] In that appendix, the Attorney General stated, "'Section 10 (e): This declares the existing law concerning the scope of judicial review * * *. Clause (5) [the substantial evidence clause] is intended to embody the law as declared, for example, in *Consolidated Edison Co.* v. *National Labor Relations Board* (305 U. S. 197)."[32] Nowhere in

[30] *Id.*, at p. 216.
[31] *Id.*, at p. 191.
[32] *Id.*, at p. 230.

the Committee Report is it intimated that the Committee disagreed with the views expressed by the Attorney General, and it is to be noted that his statement that the scope of review had not been changed, is in substance identical with that of Mr. McFarland, quoted *supra,* pp. 61–62. In a similar situation such a letter from the Attorney General was held to serve "in the absence of contradiction by the report, as an indication of the Committee's opinion on the intended effect of the [Public Vessels] Act." *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446, 452.

The House Committee Report (House Rep. 1980, 79th Cong., 2d Sess.) contains language almost identical with that of the Senate Report, and need not be quoted here.[33]

When the bill was debated on the floor of the Senate, Senator Morse stated that, "As I understand the bill in its present form, it recognizes and approves the substantial evidence rule."[34] Senators Ferguson and George indicated, however, that they thought that the former rule required merely "any evidence" to sustain an administrative decision, and inquired as to whether that was being changed.[35] Senator McCarran, the sponsor of the bill, replied:

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[33] *Id.*, at 279–280.
[34] *Id.*, at 312.
[35] *Id.*, at 321.

> The courts have given various constructions. The courts, in reviewing an order, are governed by the provisions of section 10 (e), *which states the substantial-evidence rule.* In other words, in some instances the courts have held that there must be substantial evidence. We are saying that there must be probative evidence of a substantive nature, and that even though the commission or bureau may take hearsay evidence in its hearings, it must have some probative evidence to sustain its finding.[36] [Italics supplied].

Senator George then stated that in labor relations cases "The circuit courts have frequently complained against what the Labor Relations Board did, but have said, 'We are powerless to interfere with it.' Would this bill change that rule, if the court were of the opinion that there was no probative evidence?"[37] Senator McCarran's affirmative reply obviously means no more than that if there was no probative evidence the courts could, under the new law, set aside the Board's order. This was always the rule, however, as applied by this Court, among others. To the extent that any court of appeals had erroneously conceived of the substantial evidence rule as barring reversal of Board findings which are unsupported by substantial probative evi-

[36] *Id.*, at 321.
[37] *Id.*, at 322.

dence, the rule as applied by those courts would, *pro tanto,* be changed.

The provisions in question were also discussed on the floor of the House,[38] where a similar misconception that the substantial evidence rule required affirmance of administrative findings which were based only upon a scintilla of evidence or mere hearsay, rumor, speculation and inference led sponsors of the Act to assert that it would effect a change in the scope of review. See, *e. g.,* statement of Congressman Walter,[39]

[38] *Id.*, at 375–378.

[39] *Id.*, at 370:

"The term 'substantial evidence' as used in this bill means evidence which on the whole record as reviewed by the court and in the exercise of the independent judgment of the reviewing court is material to the issues, clearly substantial, and plainly sufficient to support a finding or conclusion affirmative or negative in form under the requirements of section 7 (c) heretofore discussed. Under this section the function of the courts is not merely to search the record to see whether it is barren of any evidence, or lacking any vestige of reliable and probative evidence, or supports the agency action by a scintilla or by mere hearsay, rumor, suspicion, speculation, and inference—cf. *Edison Co.* v. *Labor Board* (305 U. S. 197, 229–30). Under this bill it will not be sufficient for the Court to find, as the late Chief Justice Stone pointed out within the year, merely that there is some 'tenuous support of evidence'—*Bridges* v. *Wixon* (326 U. S. at 178). Nor may the bill be construed as permitting courts to accept the judgments of agencies upon unbelievable or incredible evidence.

* * *

"Whether a court is proceeding upon an administrative or a judicial record, the requirement of review upon the whole record means that courts may not look only to the

and colloquy between Congressmen Voorhis and Gwynne.[40]

It is clear from the above history of the Administrative Procedure Act that the basic substantial evidence rule was not being changed. Congress intended to make it clear that the courts were not to limit themselves to looking at the evidence on one side of the case. And some Congressmen, who did not fully understand the meaning of the rule as enunciated and applied by this

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case presented by one of the parties but must decide upon all of the proofs submitted."

[40] *Id.*, at 375:

"Mr. VOORHIS of California. On the matter of court review, I wanted to ask the gentleman whether the bill will or will not make a change in the situation which now pertains as to certain agencies where, if the position of that agency is supported by any degree of reasonable evidence, the court must not go beyond that decision? Does not the bill give the court somewhat broader powers from that point of view than it would have otherwise?

"Mr. GWYNNE of Iowa. Right.

"Mr. VOORHIS of California. Would the gentleman expand on that a little bit? I think it is very important.

Mr. GWYNNE of Iowa. I might say rather briefly that there are two conflicting theories that have often been expounded by the courts. One is that if the verdict of the jury or if the finding of the triers of fact is sustained by a scintilla of evidence, any evidence, no matter how lacking in probative force, the court must sustain it. The other is that the court need not sustain a finding unless it is supported by substantial evidence. The latter is the view adopted in this bill.

Mr. VOORHIS of California. That is a change from the practice that is now in effect in regard to some agencies, is it not?

Mr. GWYNNE of Iowa. That is correct."

Court and by the courts of appeals, thought that this meant that the rule was being altered. But the text of the statute, as well as the explanation of one of its principal draftsmen, Mr. McFarland, together with the history as a whole, shows that Congress was removing any possible uncertainty as to the meaning of the substantial evidence rule, but not changing the rule itself.

2. The Labor Management Relations Act, 1947

As has been noted, the Labor Management Relations Act, enacted in 1947, merely repeated the substance of the Administrative Procedure Act by requiring that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." On its face this language is indistinguishable in meaning from that of the Administrative Procedure Act.

The bill as it was reported to and passed the House, however, went considerably further; it provided that the Board's findings should be conclusive unless they were "against the manifest weight of the evidence, or * * * not supported by substantial evidence."[41] Even as to this provision, which was not finally adopted, the House Report stated: "Although many have urged that the courts be authorized to modify and set aside findings of the Board when they were against the simple weight of the evidence, the committee believes that with a new and *impartial* Board, trials *de novo* in the courts will not be

[41] *Legislative History of the Labor Management Relations Act, 1947*, at 71, 198.

required."[42] The House debate on this provision shows that it was realized that the House bill would have materially broadened the scope of judicial review.[43]

The Senate did not accept the House proposal. The history of the provision relating to scope of review in the Senate is most illuminating. Senator Morse, a member of the Senate committee from which the bill was reported, in reviewing "the legislative history of the provisions of the committee bill" stated on the floor of the Senate that an early committee print of the bill would have authorized "reviewing courts to determine whether Board findings were in accordance with the weight of the evidence."[44] A subsequent committee print would have provided that " 'the findings of the Board with respect to questions of fact and law shall be accorded the same degree of conclusiveness as the findings of a United States district court' ", which "would have been to adopt the so-called clearly erroneous test of judicial review, substantially the same as now provided in rule 52 of the Federal Rules of Civil Procedure."[45] This also was rejected by the committee. Senators Morse and Ives urged that "the present rule as contained in the Administrative Procedure Act be retained," and the words "on

[42] *Id.*, at 332–333.
[43] *Id.*, at 697, 883, 910.
[44] *Id.*, at 1504.
[45] *Id.*, at 1504–1505.

the record considered as a whole" were added to conform to the provision of the Procedure Act.[46] The bill was reported in the form approved by Senator Morse, although a supplemental report submitted by Senators Taft, Ball, Donnell, Jenner, and Smith, indicated that they would have preferred the stronger language which the committee as a whole rejected.[47] The Senate Report itself states:

> Sections 10 (e) and 10 (f), relating to enforcement and review in the various circuit courts of appeal and in the Supreme Court, contain no changes in existing law, except with regard to the weight given to findings of the Board by the reviewing tribunal. Under the present act, the Board's findings of fact, if supported by evidence, are deemed to be conclusive. This has been construed by the Supreme Court as meaning "substantial evidence." Nevertheless, there has been some dissatisfaction with what has been viewed as too great a tendency on the part of the courts not to disturb Board findings, even though they may be based on questions of mixed law and fact (*N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111; 102 F. (2d) 658), or inferences based on facts which are not in the record (*Republic Aviation* v. *N. L. R. B.*, 324 U. S. 793, and *LeTourneau Company* v. *N. L. R. B.*, 324 U. S. 793).

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[46] *Ibid.*

[47] *Id.*, at 456.

> Although considerable sentiment was expressed in committee for a rule which requires the courts to support Board orders, unless contrary to the weight of the evidence, **it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails. In order to clarify any ambiguity in that statute,** however, the committee inserted the words "questions of fact, if supported by substantial evidence *on the record considered as a whole.* * * *"[48] [Black lettering supplied, italics in original.]

The report of the minority of the committee (which had combined with Senators Morse and Ives to form the majority on this question) stated that:

> The instant bill is designed to bring the language of the National Labor Relations Act into strict conformity with the Supreme Court's decision [in the *Consolidated Edison* case] and the Administrative Procedure Act's requirements.
>
> Our difficulty with this proposal results from the fact that we fear the changes in language will invite litigation concerning its true meaning.[49]

Thus both the majority and the minority of the committee stated that the scope of review was

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[48] *Id.*, at 432–433.

[49] *Id.*, at 500.

to be the same as in the Administrative Procedure Act.

In the debate on the floor of the Senate, Senator Taft, who had favored a broader review, accurately stated the effect of the committee proposal as follows:

> In the first place, the evidence must be substantial; in the second place, it must still look substantial when viewed in the light of the entire record. That does not go so far as saying that a decision can be reversed on the weight of the evidence. It does not go quite so far as the power given to a circuit court of appeals to review a district-court decision, * * *.[50]

Senator Taft then proceeded to say that this—

> goes a great deal further than the present law, and gives the court greater opportunity to reverse an obviously unjust decision on the part of the National Labor Relations Board.[51]

This last remark, we submit, is not consistent with the views of those who, over Senator Taft's opposition, were responsible for the language of the review provision, and also manifests a misconception as to the scope of review under the pre-existing rule. Our position is strongly supported by Senator Morse, who was responsible for the language contained in the bill, and who sub-

[50] *Id.*, at 1014.

[51] *Ibid.*

sequently stated upon the floor of the Senate that although Senator Taft was correct in defining the scope of review, "the test of review" did not differ from that applied "to the findings of other administrative agencies as provided for in Administrative Procedure Act." [52] See pages 69–70, *supra.*

In the conference committee, the House proposal for changing the scope of judicial review was rejected and the Senate proposal adopted. In his explanation of the conference decision as to this provision, Senator Taft again expressed the erroneous opinion that the Senate bill "gave additional authority to the courts in review of Board cases." [53] He also pointed out that "the House bill adopted a weight of evidence test in court review," but that the Senate conferees had "insisted" on the Senate proposal.[54]

[52] *Id.*, at 1504–5.

[53] *Id.*, at 1542.

[54] *Ibid.* Senator Taft's statement was as follows:

"* * * The House bill adopted a weight of evidence test in court review and provided that Board proceedings, so far as practicable, be conducted in accordance with the rules of evidence applicable in United States district courts. The Senate bill left unchanged the existing law with respect to the conduct of Board hearings, but gave additional authority to the courts in review of Board cases by providing that the Board findings must be supported by substantial evidence on the record considered as a whole to be conclusive. Widespread abuse of its latitude in admitting evidence was prevalent in the early history of the Board. It is the current practice of the Board in its hearings generally to follow the rules of evidence prevailing in the courts. Therefore,

The Report of the House conferees does not give quite the same impression as the language of the bill or its history before the Senate. The Report states:

> * * * While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included, both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review. [*Id.*, at 560.]

Although this may imply that the new bill was intended to allow a broader scope of review than the Administrative Procedure Act, the history of the bill in the Senate shows that the scope of review was meant to be the same, and, in fact, the language was almost identical with that found in the Administrative Procedure Act. The House Conference Report then continued:

> The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record con-

the Senate conferees were agreeable to the adoption of the House language with respect to the conduct of Board proceedings but insisted that the Senate rule on court review be accepted as the conference agreement."

sidered as a whole. The provisions of section 10 (b) of the conference agreement insure the Board's receiving only legal evidence, and section 10 (c) insures its deciding in accordance with the preponderance of the evidence. These two statutory requirements in and of themselves give rise to questions of law which the courts will hereafter be called upon to determine—whether the requirements have been met. This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact—language which the conference agreement adopts—will very materially broaden the scope of the courts' reviewing power. *This is not to say that the courts will be required to decide any case de novo themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings.* The language also precludes the substitution of expertness for evidence in making decisions. It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N. L. R. B.* v. *Nevada Consol. Copper Corp.* (316

> U. S. 105) and in the *Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation,* and *LeTourneau,* etc., cases, *supra,* without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10 (e) of the amended act.[55] [Italics supplied.]

Whether the above statement is correct in saying that the scope of review is broadened, depends, in part, upon what the test was before the new Act was passed. For reasons already stated, we think that it was not as narrow as many members of Congress believed.

3. Other Provisions in the Statutes Do Not Affect the Scope of Judicial Review

It is significant that the Committee's conclusion that the scope of review is broadened—like that of the court below—rests in large part not upon the Committee's interpretation of the language of Section 10 (e), which defines the standard of judicial review, but upon provisions in Section 10 (b) and (c), which deal not with judicial review but with Board procedure. To regard those provisions as affecting the standard of judicial review set forth in Section 10 (e) would result in nullifying the deliberate action of Congress in retaining the substantial evidence rule and rejecting broader proposals. Thus, the Committee states that the requirement in the new Section 10 (c) that the Board decide "in accordance with the preponder-

[55] *Id.*, at p. 560.

ance of the evidence," will of itself "give rise to questions of law which the courts will hereafter be called upon to determine—whether the requirements have been met." If this means that the reviewing court is to determine whether the Board's decision is supported by the preponderance of the evidence, it would be inconsistent not only with the statement in the italicized sentence of the Committee Report (quoted on p. 75, *supra*) that the courts will not themselves weigh the evidence, but with the language of the Act and almost everything else in its legislative history. The Company, which placed heavy reliance upon this passage in the Committee Report in the court below, seemed to admit that the statute does not contemplate that the reviewing court is to examine or weigh the evidence *de novo,* substituting its judgment on the weight of the evidence for that of the Board (Br., pp. 20, 28). But the Company also urged, in the same sentences, that it is the function of the reviewing court to determine whether the agency's findings are "supported by a preponderance of *all* of the evidence in the record" (Br., p. 20), that *"all of the testimony in the record shall be weighed* to determine whether that which supports the Board's findings is or is not preponderant" (Br., p. 28). [Italics not ours.] As we pointed out to the court below, the concession and the assertion seem to be basically inconsistent. To determine whether the Board's findings are supported

by a preponderance of the evidence is the same as weighing the evidence *de novo*.

The passage referred to, therefore, must mean that a reviewing court may overturn a Board finding if it appears that the Board, in its process of decision, has not applied the standard of preponderance of the evidence. This, we submit, would always have been ground for reversal. The Board has always assumed that it was bound to decide cases upon the basis of the preponderance of the evidence before it.[56]

Similarly, the courts have always been empowered to reverse the Board when it excluded material evidence or placed reliance upon evidence which was inadmissible. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 28; *Jacobsen* v. *National Labor Relations Board*, 120 F. 2d 96, 100–101 (C. A. 3); *Humble Oil Co.* v. *National Labor Relations Board*, 113 F. 2d 85, 90 (C. A. 5); *Loveman, Joseph & Loeb* v. *National Labor Relations Board*, 146 F. 29, 769, 772 (C. A. 5); *Burlington, D. & F. Co.* v. *National Labor Relations Board*, 104 F. 2d 736, 739

[56] The Board in one of the first of the five test cases which came before the Supreme Court indicated that it assumed the burden of proof in cases before it. In its brief in *Washington, Virginia and Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142, it stated (br., pp. 22–23, filed Feb. 1937): "Of course the Board carries the burden of proof in the administrative proceedings, and did so in this case." See also the Board's *First Annual Report*, 1936, p. 23; and the Board's *Statement of Procedure*, 1946, 11 F. R. 14240, sec. 202.9.

(R. A. 4). Cf. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 222–226. See also, *Reilly* v. *Pinkus*, 338 U. S. 269, 275–277. While the new Section 10 (b) requires that Board proceedings "be conducted in accordance with the rules of evidence applicable in the district courts of the United States," and thereby perhaps imposes more rigid restrictions upon the conduct of hearings, this provision does not of itself expand the scope of review but at most alters the substantive law applied initially by the Board and on review by a court in determining the propriety of the Board's exclusion of or reliance upon certain evidence.

The court below also relied on Section 7 (c) of the Procedure Act, which directs administrative agencies generally to decide cases "in accordance with the reliable, probative, and substantial evidence." Indeed, the statement in the opinion that the court was called upon to determine whether the Board's finding was supported by the "reliable, probative, and substantial evidence" establishes that the court below conceived of Section 7 (c) as directly defining the scope of judicial review. But this provision, clearly, defines and applies to the functions of the Board in making decisions initially; it does not define and is inapplicable to the functions of the reviewing court. The functions of the latter, as the language of the statute demonstrates, and as all other courts have held, are defined exclu-

sively in Section 10 (e) of the two statutes; and these Sections restrict the reviewing courts to determining whether the Board's findings are supported by substantial evidence on the record considered as a whole.[57]

Summary and conclusions.—In brief, the history of the review provisions of the Administrative Procedure and Labor Management Relations Acts shows that, when the former was passed, its draftsmen recognized that the scope of review was not being changed, but only clarified to resolve the doubts held by some persons as to whether the substantial evidence test required examination of the record as a whole. That this was all that was done appears plainly when the

[57] If it be assumed that the scope of review has been broadened by the indirect method suggested in the report of the House Committee discussed above, then the "expanded" scope of review would have no application in the instant case. For the suggested expansion derives from the application of Section 10 (b) and (c) of the new Act, which are procedural amendments relating to Board hearings and the Board's decisional process. Such amendments as we have shown above, Point I, *supra*, are effective only as to procedural steps taken after enactment of the amendments and hence can have no application in this case, since the Board proceedings were completed and its decision issued before enactment of the new law. Thus, if the new power of a court to reverse the Board for failing to apply the rules of evidence applicable in a district court were deemed to expand the scope of review, this power could not properly be exercised in a case decided by the Board prior to the amendments, since the Board could not be held to have erred in failing to observe procedural requirements not yet enacted by Congress.

language of the Act is compared to the test previously applied by this Court in reviewing administrative decisions. The Labor Management Relations Act in terms unquestionably adopts the same rule as the Administrative Procedure Act. The history of the later statute shows that the majority of the Senate Committee which was responsible for the language contained in the Act intended that the rule under the two statutes be the same, and succeeded in defeating proposals by the House and a minority of the Senate Committee containing language which would clearly have had the effect of enlarging the scope of review.

In the light of this background, subsequent statements made by the House conferees and a member of the minority of the Senate Committee on this point to the effect that the scope of review was enlarged can hardly be sufficient to give the statute a meaning which its text will not support. In the words of a recent commentator, "If the LMRA made any change, however, it must have been brought about by the Act's legislative history, not by its words. But it is a curious argument that enactment of words already enacted can produce a change on account of legislative history perpetrated by those who lack power to enact words not already enacted. If the proponents of a broader scope of review had had the power, they would have amended the statute to provide for it. But the fact is that Congress

resisted that effort." [58] It cannot be doubted that a number of members of Congress thought that the scope of review was being broadened. But this resulted from the fact that they were not fully familiar with or had not properly analyzed the decisions of this Court and of the courts of appeals,[59] and thus incorrectly assumed that the prior scope of review was narrower than it really was. This mistaken impression, however, obviously does not provide an adequate basis for giving an expanded meaning to the expressions used.

We submit that the legislative history of the Acts as a whole serves merely to confirm our argument based upon their text that the scope of review has not been changed. But, if the expressions to the contrary to which we have referred

[58] Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 Columbia Law Review 559, 563 (1950).

[59] The Conference Report had referred to the following decisions as indicating that the courts had "abdicated" to the Board: *National Labor Relations Board* v. *Standard Oil Co.*, 138 F. 2d 885, 887 (C. A. 2) (in which the word "abdication" was used in a narrower context); *Wilson & Co.* v. *National Labor Relations Board*, 126 F. 2d 114, 117 (C. A. 7) (which implies that "some evidence" may be a sufficient basis for supporting a Board order); *National Labor Relations Board* v. *Columbia Products Corp.*, 141 F. 2d 687, 688 (C. A. 2) (which accepts the "rational person" test); *National Labor Relations Board* v. *Union Pacific Stages*, 99 F. 2d 153 (C. A. 9) which, as appears from the opinion as a whole and the excerpt from p. 177, quoted at p. 52, *supra*, plainly holds that the courts look at the whole record in determining whether the Board's findings are supported by substantial evidence).

should be given more weight than we think they are entitled to, the most that could be said would be that "the legislative history is more conflicting than the text is ambiguous". *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49. Ambiguous or confusing legislative history cannot be controlling in statutory interpretation when the meaning of the words of the statute is plain.

C. THE DECISION BELOW IS CONTRARY TO THE VIEW OF SEVEN OTHER COURTS OF APPEALS

1. Decisions Under the Taft-Hartley Act

For the reasons set forth in the preceding paragraphs, every court of appeals—seven in all—with the exception of the court below, which has had occasion to consider the effect of the amendment to Section 10 (e) has concluded that it did not change the substantial evidence rule in any respect. *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131, 134–136 (C. A. 4); *National Labor Relations Board* v. *Universal Camera Corp.*, 179 F. 2d 749, 751–752 (C. A. 2), pending on writ of certiorari, No. 40, this Term; *National Labor Relations Board* v. *Booker*, 180 F. 2d 727, 729 (C. A. 5); *National Labor Relations Board* v. *LaSalle Steel Co.*, 178 F. 2d 829, 833–834 (C. A. 7), certiorari denied, 339 U. S. 963; *National Labor Relations Board* v. *Minnesota Mining & Mfg. Co.*, 179 F. 2d 323, 325–326 (C. A. 8); *National Labor Relations Board* v. *Continental Oil Co.*, 179 F. 2d 552, 555 (C. A.

10); see *Mueller Brass Co.* v. *National Labor Relations Board*, 180 F. 2d 402, 405 (C. A. D. C.), citing the *Eastern Coal* case.[60] See also *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U. S. 217, 220, n. 4.

In the language of the courts of appeals:

> "By these changes Congress may have intended to broaden the scope of judicial

[60] Earlier decisions of the Fifth and Seventh Circuits, shortly after passage of the amended Act, did not go so far as to state that the amendment had not altered the substantial evidence rule in any way, although they left no doubt that a reviewing court was still not permitted to engage in a trial *de novo*. *National Labor Relations Board* v. *Caroline Mills, Inc.*, 167 F. 2d 212, 213 (C. A. 5); *National Labor Relations Board* v. *Austin Co.*, 165 F. 2d 592, 595 (C. A. 7); see also *National Labor Relations Board* v. *Victor Mfg. Co.*, 174 F. 2d 867, 868 (C. A. 7). In the *Caroline Mills* case the Court of Appeals for the Fifth Circuit said that the amendments "give the courts more latitude on review" but that "They do not, however, provide for a hearing *de novo* * * *." The question had not been extensively briefed or argued in that case, and whatever ambiguity may have lurked in the language quoted has since been dispelled by that court's decision in the *Booker* case, 180 F. 2d 727, 729, where, after quoting the pertinent provisions of Section 10 (e) in both the old and the amended Act, the court concluded: "Thus there is no difference in legal meaning and practical effect between the two statutes. *National Labor Relations Board* v. *Columbian, etc. Co.*, 306 U. S. 292, 299." The reference to the *Columbian* case establishes that the Fifth Circuit, unlike the court below, reads the amendatory language of the Act as merely codifying the existing substantial evidence rule. The recent decision of the Seventh Circuit in the *LaSalle Steel* case, cited in the text, likewise makes it perfectly clear that that court also holds the substantial evidence rule to have been unchanged.

review and confer power upon the courts to review the board's findings of fact as well as conclusions of law. If it had such an intent, it failed in the result. The amendments limit the review to a determination as to whether or not, considering the record as a whole, there is substantial evidence to sustain the finding. So far as review is concerned, this leaves us in the same status as before the amendments." *National Labor Relations Board* v. *Continental Oil Co.*, 179 F. 2d 552, 555 (C. A. 10).

"* * * It is true that there were efforts, especially in the House, to give to courts of appeal a wider review than before; but the Senate opposed these, and, so far as concerns the adjective, 'substantial,' it added nothing to the interpretation which the Supreme Court had already put upon the earlier language. The most probable intent in adding the phrase, 'on the record considered as a whole,' was to overrule what Congress apparently supposed—perhaps rightly—had been the understanding of some courts: i. e., that, if any passage could be found in the testimony to support a finding, the review was to stop, no matter how much other parts of the testimony contradicted, or outweighed, it. * * * It appears to us that, had it been intended to set up a new measure of review by the courts, the matter would not have been left so at large. We cannot agree that our review has been 'broadened'; we hold that no more was done than to make defi-

nite what was already implied." *National Labor Relations Board* v. *Universal Camera Corp.*, 179 F. 2d 749, 752 (C. A. 2).

"These changes as the Committee Reports clearly show, were inspired by the dissatisfaction of Congress with decisions of the Board in certain cases and with the inability of the courts to correct them; and it was believed by some persons that the new Act broadened the scope of judicial review and conferred upon the courts power to correct mistakes committed by the Board in its findings of fact as well as in its conclusions of law. We are unable, however, to find that this result was accomplished. See *N. L. R. B.* v. *Austin Co.*, 7 Cir., 165 F. 2d 592, 595; *N. L. R. B.* v. *Compton-Highland Mills, Inc.*, 69 S. Ct. 960. That the Board was cautioned to observe the usual rules of evidence and to consider the whole record and to base its findings upon the preponderance of all of the evidence is undeniable; and the courts themselves were directed to determine whether the Board's findings of fact were supported by substantial evidence in the record considered as a whole. But findings so supported are still conclusive upon the courts since the critical words selected by Congress for the guidance of the courts are the existence of 'substantial evidence' to support the Board's findings and these are the same words which the Supreme Court has defined in this very context to

> mean 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion.' *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229; *N. L. R. B.* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300. * * *
>
> "Our conclusion is that although the Board is warned to decide labor controversies upon the whole record and in accordance with the preponderance of the evidence, the court in reviewing the decisions is not empowered to weigh one bit of evidence against another with a view of determining which it will accept as true or to substitute its judgment for that of the Board in determining what ultimate facts are established by the circumstances in evidence. The court reviews the findings of the Board as it reviews the findings of a jury on a motion n. o. v., that is to say, the findings, like the verdict, must stand if there is substantial evidence in the record to support them." *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131, 134–6 (C. A. 4).[61]

In reaching the contrary conclusion that the scope of review was broadened by the Taft-Hartley Act the court below relied upon its own prior decision in *National Labor Relations Board*

[61] The court at this point referred to and quoted from its earlier decision in its *Appalachian Power* case, 93 F. 2d 985, approved by this Court in the *Consolidated Edison* and *Columbian Enameling* case, referred to herein at pp. 51–52, *supra*.

v. *Tappan Stove Co.*, 174 F. 2d 1007, 1008. In the *Tappan Stove* case the court had stated that the Labor Management Relations Act "merely broadened the Wagner Act to the extent that the findings of fact of the National Labor Relations Board must now be based upon substantial evidence rather than upon evidence unqualified by the adjective 'substantial'; and that determination of issues of fact must be reached upon consideration of the record as a whole." However, in the *Thompson Products* case, 97 F. 2d 13, 15, discussing the substantial evidence rule as it existed under the Wagner Act, the court below had earlier held that Board orders must be enforced "unless clearly improper or unsupported by substantial evidence" and that substantial evidence required "consideration [of] all the facts * * * in their entirety and relation to each other." In the *Columbian Enameling* case, *supra,* this Court had adverted to the *Thompson Products* formulation of the rule with approval. There would thus seem to be no distinction in meaning between the allegedly "broader" rule stated in the *Tappan Stove* case and the substantial evidence rule laid down by the court below under the Wagner Act. Furthermore, an examination of the cases decided by the court below prior to the adoption of the new statutes establish that that court never interpreted this Court's decisions as requiring it to

look at only part of the record instead of considering all the evidence.[62]

These cases, and the similarity of language used in the *Tappan Stove* case (which in effect quotes the statute) with that in the *Thompson Products* case, indicate that the court below was in error

[62] See, for example, *National Labor Relations Board* v. *Thompson Products, Inc.*, 130 F. 2d 363, 368, where the court below had stated, "We have examined the record with care." See also, *National Labor Relations Board* v. *Sands Mfg. Co.*, 96 F. 2d 721, 724, 726, affirmed, 306 U. S. 332; *National Labor Relations Board* v. *Empire Furniture Corp.*, 107 F. 2d 92, 94–96; *Midland Steel Products Co.* v. *National Labor Relations Board*, 113 F. 2d 800, 802, 805; *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. 2d 905, 915, certiorari denied, 312 U. S. 689; *Ohio Power Co.* v. *National Labor Relations Board*, 115 F. 2d 839, 841; *Atlas Underwear Co.* v. *National Labor Relations Board*, 116 F. 2d 1020, 1022; *National Labor Relations Board* v. *Dow Chemical Co.*, 117 F. 2d 455, 457, 458; *National Labor Relations Board* v. *Newberry Lumber Co.*, 123 F. 2d 831, 833–834; *National Labor Relations Board* v. *Precision Castings Co.*, 130 F. 2d 639, 643; *National Labor Relations Board* v. *Ohio Calcium Co.*, 133 F. 2d 721, 727–728; *National Labor Relations Board* v. *American Creosoting Co.*, 139 F. 2d 193, 196–197; *National Labor Relations Board* v. *Clinton Woolen Mfg. Co.*, 141 F. 2d 753, 758; *National Labor Relations Board* v. *Grieder Machine Co.*, 142 F. 2d 163, 166, certiorari denied, 323 U. S. 724; *National Labor Relations Board* v. *Brown-Brockmeyer Co.*, 143 F. 2d 537, 542; *National Labor Relations Board* v. *Cincinnati Chemical Works*, 144 F. 2d 597, 598–599; *National Labor Relations Board* v. *Ridge Tool Co.*, 151 F. 2d 947, 948; *National Labor Relations Board* v. *West Kentucky Coal Co.*, 152 F. 2d 198, 202, certiorari denied, 328 U. S. 866; *National Labor Relations Board* v. *Metal Mouldings Corp.*, No. 9302, unreported, decided April 6, 1943.

in believing that the substantial evidence rule which the new Act established was "broader" than the one it had always applied under the Wagner Act. Cf. *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 227.

2. Decisions Under the Administrative Procedure Act

In holding that the Administrative Procedure Act created a new and broader substantial evidence rule[63] the court below likewise stands alone among the courts of appeals. Every other court of appeals which has considered the question has held that in the Administrative Procedure Act Congress did no more than codify the substantial evidence rule as previously enunciated by this Court in the *Consolidated Edison* case. *National Labor Relations Board* v. *Minnesota Mining & Mfg. Co.*, 179 F. 2d 323, 325–326 (C. A. 8); *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 685 (C. A. 9), certiorari denied, 338 U. S. 860; *National Labor Relations Board* v. *National Plastic Products Co.*, 175 F. 2d 755, 760 (C. A. 4); *Delta Stevedoring Co.* v. *Henderson*, 168 F. 2d 872, 873, 874 (C. A. 5); cf. *Anderson* v. *Comm'r of Internal Revenue*, 164 F. 2d 870, 874 (C. A. 7). In the *Minnesota Mining & Mfg.* case, the Eighth

[63] The court below has so held not only in the instant case but also in *Lincoln Electric Co.* v. *Comm'r of Internal Revenue*, 162 F. 2d 379, 382.

Circuit stated with regard to both statutes here involved (179 F. 2d, p. 326):

> We think that neither of the Acts referred to has made any material change in the scope of review of the orders of the Board or in its functions as a trier of the facts. A decision of a court, a jury, or an administrative agency, which is unsupported by substantial evidence, is, of course, arbitrary and capricious and may always be set aside on review; but, if the decision has a rational and substantial basis in the evidence and the law, it may not be nullified by a reviewing court, even though that court is of the opinion that it would have reached a different conclusion had it tried the case.

As the Ninth Circuit stated in the *Willapoint Oysters* case (174 F. 2d at 685):

> We do not view this particular directive, § 1009 (e), as one requiring us to go beyond the limits now generally recognized under the so-called "substantial evidence" rule, or to weigh evidence and substitute our own judgment for that of the administrative agency.

The language and legislative history of the Act, discussed above, clearly establishes, we believe, that this view, rather than that of the court below, is correct.

III

THE COURT BELOW ERRED IN SETTING ASIDE THE BOARD'S ORDER EVEN IF THE SCOPE OF REVIEW HAS BEEN CHANGED

A. THE COURT BELOW DISREGARDED THE LAW OF THE CASE AS ESTABLISHED BY THIS COURT'S DECISION

If, as we have shown above, the scope of review has not been broadened, the prior holding of this Court that the Board's findings are supported by substantial evidence under the test of the *Consolidated Edison* case must be considered the law of the case. *United States* v. *United States Smelting Co.*, 339 U. S. 186, 198, and cases cited. Even assuming that prior to the new Act some courts in applying the substantial evidence rule did not review the record as a whole, and that as to these courts the rule has *pro tanto* been changed, that change would be of no consequence in this case, since this Court has always reviewed the record as a whole. See pages 55–58 *supra*.

In addition, this Court's statement, made after "careful scrutiny of the record," that "the printed transcript suggests thoughtful and discriminating evaluation of the facts," leaves no doubt that it did not arrive at the conclusion that the Board's findings were supported by substantial evidence merely upon the basis of a one-sided examination of the evidence. Moreover, assuming *arguendo* that in some respects the

scope of review has changed, the conclusion of the court below that, considering the record as a whole, no reasonable person could have made the findings which were made by the Board, is, as we shall show (p. 98, *infra*), inconsistent with this Court's opinion.

Particularly is this true with respect to the holdings of the court below, discussed *infra*, pp. 97–114, that testimony of various witnesses, credited by the Board, should have been discredited, and the testimony of other witnesses, discredited by the Board, should have been believed. For in its opinion this Court passed upon these precise contentions, holding that "our attention has been called to no credited testimony which 'carries its own death wound,' and to none discredited which 'carries its own irrefutable truth.'" (337 U. S., at 660.) Since the rules for determining the credibility of witnesses are the same in any sort of judicial proceeding, it is apparent that this Court was not "left with the definite and firm conviction that a mistake has been committed" (*United States* v. *Gypsum Co.*, 333 U. S. 364, 395), insofar as the Board's resolution of conflicting testimony was concerned.[64] Thus, even if the test under an allegedly enlarged scope of review is the same

[64] Cf. *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342; *United States* v. *National Ass'n of Real Estate Boards*, 339 U. S. 485, 495–496.

as the one applied under the "clearly erroneous" rule (see *supra*, p. 69), the court below could not, consistently with this Court's opinion, reverse the Board's findings as to credibility of witnesses, and substitute contrary findings of its own.

The court below, we submit, violated the terms of the remand by its holdings, discussed *infra*, pp. 119–143, that the Company's instructions to its supervisors to remain neutral relieved it of responsibility for their acts of interference and coercion; that the absence of evidence relating to unfair labor practices on 66 ships established that on these ships no unfair labor practices were committed; and that the Company had therefore not been shown to have engaged in a course of conduct violative of Section 8 (1) of the Act. These precise contentions as to the law had been presented unsuccessfully to this Court; indeed these the points were emphasized in the briefs and argument for respondent when the case was here in 1949. On these points, which are not evidentiary but legal, it has not even been suggested that the applicable principles of law were changed by the amended Act.

B. THE COURT BELOW APPLIED AN ERRONEOUS STANDARD IN REVIEWING THE BOARD'S FINDINGS OF FACT

Except by quoting the statutory language, the court below did not attempt to define the new

"broadened" substantial evidence rule which it found applicable to the case. Compare, *National Labor Relations Board* v. *Thompson Products, Inc.*, 97 F. 2d 13, 15 (C. A. 6). However, an analysis of the court's discussion of the factual issues (see *infra*, pp. 97 *et seq.*) establishes that the "failure to enforce the Board's order resulted from the substitution of its own judgment on disputed facts for the Board's judgment." *National Labor Relations Board* v. *Waterman S. S. Corp.*, 309 U. S. 206, 226.

Even assuming that the scope of review has been broadened by the words "upon the record as a whole", we submit that the new Acts have not reversed the rule laid down by this Court in the *Waterman Steamship* case, 309 U. S., at 208–209, 226, that the power to reverse the Board's judgment on disputed facts "has been denied the courts by Congress." The legislative history of both Acts, discussed *supra*, pp. 59–83, demonstrates conclusively, we believe, that Congress understood that neither the Administrative Procedure Act, nor the Labor Management Relations Act, would transfer from the Board to the courts ultimate power to make findings of fact and draw reasonable inferences therefrom. As the Report of the House Conference Committee on the Labor Management Relations Act put it: "This is not to say that the courts will be required to decide any case *de novo* themselves weighing the evidence, but they will be under a duty to see that

the Board * * * does not infer facts that are not supported by evidence or are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings."[65] Indeed, the legislative history shows that the amendments to Sections 10 (b) and (c) of the Act were designed to strengthen the Board's decisional process, and that the House Conference Committee expected that from these provisions "Immeasurably increased respect for decisions of the Board should result * * *."[66]

It remains true therefore under the amended Act, as under the original Act, that, as this Court stated in the *Waterman Steamship* case, 309 U. S. 206, 208–209:

> It is of paramount importance that courts not encroach upon this exclusive power of the Board [to make findings of fact and draw reasonable inferences therefrom] if effect is to be given the intention of Congress to apply an orderly, informed and specialized procedure to the complex administrative problems arising in the solution of industrial disputes. As it did in setting up other administrative bodies, Congress has left questions of law which arise before the Board—but not more—ul-

[65] Legislative History, *op. cit.*, *supra*, note 9, p. 42, p. 560.
[66] *Ibid.*, p. 558.

> timately to the traditional review of the judiciary. Not by accident, but in line with a general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act.

We shall now demonstrate that the court below substituted for the Board's findings of fact findings of its own, and that it drew from the evidence inferences contrary to those drawn by the Board. This discussion will also demonstrate that in every such instance the Board's findings and inferences were the more reasonable, and that, therefore, on any standard of review, the Board's findings should have been sustained.

C. THE COURT BELOW IMPROPERLY REJECTED THE BOARD'S FINDINGS CONCERNING THE CREDIBILITY OF VARIOUS WITNESSES

It is clear from its opinion (R. 881–884) that the court below did not accept the Board's conclusions as to the credibility of witnesses, and that it chose to believe the Company's witnesses rather than the Board's whenever there was a conflict of consequence. And the Company has continued to argue that the court should accept the testimony of its witnesses as against testimony found by the Board to be more credible—in part

for the same reasons repudiated by this Court in 1949.

Under no standard of appellate review with which we are familiar does the reviewing court substitute its judgment for that of the original fact finder with respect to the credibility of witnesses. Appellate courts have recognized that it is often difficult to tell from the bare printed record which witnesses are telling the truth when testimony is in conflict, and that in determining questions of credibility the person who sees and hears the witness has a substantial advantage. For that reason, among others, appellate courts generally do not reverse lower tribunals on issues of this sort except when it is clear from the printed record that the witnesses on one side are not truthful.

In its 1949 opinion in this case, this Court stated in its discussion of the examiner's findings as to credibility, which the Board ordered adopted, that "the printed transcript suggests thoughtful and discriminating evaluation of the facts" (337 U. S., at 660). This language in itself suggests that the weighing of the evidence by the Board here cannot be regarded as arbitrary or unreasonable, on the basis of the record as a whole. The Court also noted that "The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the trier of fact" (337 U. S. at 659).

In the present case, as would be expected, it is sometimes difficult to tell from the printed record

which of two conflicting stories is the true one. But, we submit, for a surprisingly large proportion of the principal Company witnesses, an examination of their printed testimony discloses that they were evasive and untruthful. On two of the seven ships covered by the Board's findings—the *Johnson* and the *McGonagle*—the testimony relied upon by the Board was uncontradicted. On each of the other five ships the record clearly discloses, in our opinion, that one or more of the chief officers was not testifying honestly and candidly. We think it would be difficult to find a case in which analysis of the printed record more fully substantiates the hearing officer's findings as to credibility.

The following examples show why we believe that the trial examiner, who had the advantage of seeing and hearing the witnesses, properly assessed their credibility.

1. THE *OLDS*, VOGEL, AND THE DISCHARGE OF SHARTLE

The Board, in finding the discharge of Shartle discriminatory, credited the bulk of Shartle's testimony, while refusing to credit his denial of the winch incident (R. 836, n. 43; see p. 17, *supra*). This Court did not regard Shartle's denial of the winch incident as inflicting a "death wound" upon other portions of his testimony, which the Board had found credible. Nevertheless, the court below rejected all of Shartle's testimony, on the ground that his denial of the winch incident made it

"difficult to understand how Shartle's other testimony could be considered entirely credible" (R. 882). This holding is not only inconsistent with this Court's conclusion, but conflicts with the well-established principle that a trier of fact need not accept all of the testimony offered by a witness in order to sustain a finding based largely upon evidence adduced by that witness.[67]

Moreover, although the Board had in the main rejected the testimony of Dobson, Hewer, Chrobak and Captain Murray, insofar as it conflicted with other credited testimony relating to the Shartle discharge, and this Court had approved the rejection on the ground that their testimony did not carry "irrefutable truth," the court below credited their testimony entirely. An analysis of some of the testimony of these officers will show that the Board's refusal to lend credence to their statements was entirely justified.

(a) *First Mate Dobson.*—First Mate Dobson of the *Olds* is the officer who discharged Shartle, and subsequently attempted to mete out the same treatment to Vogel when he discovered that the latter had succeeded Shartle as Union organizer (*supra*, pp. 11–12, 21). An analysis of Dobson's testimony regarding the Vogel incident clearly shows that the Board's doubts as to Dobson's veracity were well founded. Thus on direct examina-

[67] *Lavender* v. *Kurn*, 327 U. S. 645, 653; *Tucker* v. *Loew's Theatre Corp.*, 149 F. 2d 677, 679 (C. A. 2).

tion Dobson denied that he ordered Vogel to leave the ship (R. 823; 504). However, on cross-examination Dobson admitted that he had discovered on the day Vogel was ordered to leave that Vogel was the union organizer (R. 508) and that, "I was awfully surprised to find out that Vogel was the person who was causing so much trouble" (R. 509). In the next breath, however, he denied that there had been any trouble on the ship during the organizing campaign (*ibid.*). Dobson also admitted that Vogel said that he would not have enough time to pack his clothes before the ship sailed, and that "I may have told him not to get off that trip" (R. 518–519). Obviously, in the light of the admitted conversation, someone must have ordered Vogel to leave the ship immediately, and the only other person present at the time was Dobson. The first mate also testified that there was a shortage of seamen during the war and that he usually inquired why a man wanted to leave the ship particularly when the ship was short-handed, as it then was (R. 519–520). However, although he knew that Vogel would leave at the end of the trip, he made no inquiry as to the reason and said he didn't know why (*ibid.*).[68]

[68] Note Dobson's statement that "We are supposed to ask *each and every member* when he quits why he is leaving" (R. 519, emphasis supplied). Only the fact that the first mate knew that Vogel was leaving because he had ordered him to do so would explain his failure to ask the usual and required

First Mate Dobson also stated that one of the reasons for the discharge of Shartle was his failure to perform his share of the painting during the fit-out (R. 499). Dobson testified that he himself observed the men painting the side of the ship and saw Shartle was shirking on the job (R. 513–514). He had also had a complaint to the same effect from the second mate (R. 499). Nevertheless Dobson testified that he did not say anything to Shartle at the time and did not reprimand him in any way (R. 514). Dobson's story that he saw a seaman loafing on the job and did not criticize him for it, or urge him to get to work, taxes credulity. Either Dobson was admittedly derelict in his own duty, or as is more likely, he had no reason to take disciplinary action because Shartle was performing his work adequately. And the latter reason, which the Board found to be the true one (R. 834), is supported by the testimony of Vogel, who was Shartle's partner during the painting season (R. 216, 220–221). Furthermore, the urgency with which Dobson interrupted the eringle splicing work when he saw Vogel helping Shartle, and his alleged decision immediately to discharge him for that reason (R. 216, 506), creates a valid doubt that, had the painting incident occurred as he

questions. It is also noteworthy that Dobson first denied having any knowledge as to Vogel's prior testimony, and then later admitted that Company counsel had discussed it with him (R. 518).

testified, he would have let it pass unnoticed for four weeks. The first mate testified that painting is a part of an A. B.'s job not only during fit-out but throughout the sailing season (R. 520–521). On the other hand a splicing job may occur about once every six months (R. 200). It would therefore not have been surprising to Dobson that Shartle, a young man less than two years at sea, did not have any real prior experience at splicing cringles. Nevertheless, Dobson, who presumably overlooked the alleged dereliction in painting for more than four weeks, seized immediately upon the splicing incident, when he saw Shartle being assisted by Vogel, to terminate Shartle's employment (R. 216, 506). His testimony therefore is internally inconsistent and improbable, as well as in conflict with that of Vogel as well as Shartle. And he was the most important of the company witnesses with respect to the dismissal of Shartle, since he was the officer entirely responsible for the discharge.

(b) *Captain Murray.*—The defects in Captain Murray's testimony are equally apparent (R. 822, 834, n. 39; 673–695). Thus, the captain testified that he had once called upon Shartle to take the wheel and found him to be incompetent (R. 674–675). However, Third Mate Hewer, a Company witness, who was present at the time, testified that Shartle had handled the wheel properly, although steering the ship was not a part of

Shartle's regular duties (R. 540). Similarly, the captain stated that Shartle was not permitted to handle the winch controls after the incident wherein he permitted the cable to become too taut (R. 685–686); but Second Mate Chrobak, appearing as a Company witness, testified that Shartle did operate the winches after that date (R. 350). Captain Murray also stated that there was no shortage of A. B.'s and that he could obtain as many as he needed (R. 684), a statement that was contradicted by the Company's industrial relations manager (R. 671–672), and by his own mates (R. 338–339, 507, 508, 519–520). Captain Murray, who had been on the lakes for 45 years (R. 673), also testified that he didn't know anything about the Union or even that there was an organizing campaign on his ship, and that he didn't remember what he had testified about before the War Labor Board two years before, why he was there or who called him, when the cross-examination indicated that this might be pertinent to the present case (R. 691–692).

(c) *Hewer.*—Third Mate Hewer testified at one point that he could not recall definitely that he had ever discussed Shartle's competency with the first mate (R. 525, 527–528), and later vaguely remembered that Dobson had questioned him concerning Shartle and that he had told him that "there was a number of things that he was doing that weren't up to par, could be much better"

(R. 528). Because of the indefinite nature of Hewer's testimony the Board did not accept it (R. 833, n. 37), but the court below found that "it is undisputed that Dobson" did discuss Shartle's work with Hewer (R. 882). Hewer also testified that he did not know that Shartle was a union organizer until the day of the discharge, when he ascertained that fact from one of the other seamen (R. 530–533). He admitted, however, that the men continually spoke about matters that interested them; that such discussions were carried on during mealtimes; that many of the seamen ate at the same table with the officers; and that it did not take very long for the officers to learn what the men were talking about (R. 532). Since there can be no question but that the Union's organizational drive, and its principal proponents, were probably among the chief topics of conversation at that time, the Board, for that reason as well as the others stated in its opinion, found Hewer's testimony on this point unacceptable (R. 831).

(d) *Chrobak.*—Second Mate Chrobak also attempted to explain away his denial of knowledge of Shartle's organizational activities by alleging that he, as well as the other officers, first discovered Shartle's status about three days after the discharge, by reading in a Cleveland newspaper that charges had been filed with the Board (R. 340–341). However, as the Board pointed out (R. 831, n.

35), no charges were filed in reference to Shartle until many months after the discharge (R. 668). Chrobak's testimony on this point, therefore, could not have been credited. Nevertheless, the Board did not consider that this statement was sufficient to warrant discrediting all of Chrobak's utterances, and did accept his version of the winch incident (*supra,* p. 17). Had the court below applied to Chrobak the test it invoked with respect to Shartle, it would have rejected the very testimony as to the winch incident which the Board credited in preference to Shartle's.

2. *The Morse—Captain Gerlach.*—Captain Gerlach of the *Morse* was perhaps the most evasive witness the Company produced. The captain testified that he knew nothing about the Union or its program (R. 307–308, 326). But he admitted he was able to advise seaman Zmrazek that unions were not being properly led, and that the rotary hiring system, which was a major point in the Union's program, would be disadvantageous to him (R. 307, 313). The captain also stated that he had never seen or read the "Ferbert letters" (R. 57, 743–746) or received any information or instructions from the Company concerning the election (R. 327–328), and that he learned that an election would be held on his ship only by hearing other people talk about it (R. 327–328). This testimony may be compared with that of the Company's chief mail clerk (R. 656)

that the letters were sent to all ships' masters for distribution to the crew (R. 657, 661, 793, 797), and that of the Company's Manager of Industrial Relations (R. 664) that at the annual spring meeting of the captains and chief engineers they were advised by the President of the Company as to its policy concerning the Union and the coming election (R. 667–669). Again, Captain Gerlach, in testifying about the occasion when he had ejected Weissflog from the messroom for attempting to organize the employees, first said, on cross-examination, that the waitress who complained to him had not said that Weissflog was talking about the Union (310, 322–323); but on further examination by the trial examiner he finally reluctantly admitted that the girl had told him Weissflog was soliciting membership for the Union (R. 325). The captain's attempts to evade answering the questions asked by Board counsel and the trial examiner until Company counsel advised him to do so are particularly evident on this point (R. 324–325). Captain Gerlach also said at one time, in justification of his stopping Weissflog from talking in the messroom, that there was a rule against "talking around at meal time in the messroom or dining room" (R. 323). Since this was obviously ridiculous, Gerlach was compelled to retract his statement (*ibid.*). He admitted that he had never reprimanded anyone other than Weissflog for talking in the messroom (R. 324).

3. *The Widener—Chief Hunger.*—Chief Engineer Hunger of the *Widener* is another Company witness whose testimony in many respects was vague and self-contradictory (R. 817–818; 628–648). Thus, Chief Engineer Hunger testified that he didn't know there would be an election until "almost election time" (R. 644), although he was present during the meeting held by the Company for captains and chief engineers in March 1944 at which the matter was discussed (R. 631–632, 646, 549, 665–666). The chief engineer also testified that when he ordered seaman Babin out of the engine room he also warned him not to bother the men in their rooms because it was interfering with their sleep (R. 629–630). However, on cross-examination he admitted that he did not know Babin was talking to the men in their rooms until a week later, when one of the engine crew complained about it (R. 638–640), and he was therefore unable to explain why he had warned Babin against the practice before he himself knew about it (R. 639–640). Chief Engineer Hunger also insisted he did not know Babin was a union organizer when he ordered him out of the engine room (R. 638), but that statement is hardly consistent with his fear that Babin was "trying to talk [one of the engine crew] into something" (obviously membership in the Union), and his testimony that he saw literature in Babin's pocket and "thought it was something pertaining to the——" (R. 637–638).

The Board, crediting the testimony of Babin, and discrediting the conflicting testimony of Captain Lehne and Chief Engineer Hunger, found that Lehne and Hunger unreasonably restricted Babin's efforts to solicit union membership among the crew of the steamer *Widener, inter alia,* by prohibiting him from talking about the Union to the men in the engine room. Babin had testified that it was his duty as a deck hand to mark the soundings on the board used for the guidance of the engineers; that this board was kept on the inside of the door of the engine room leading to the fantail (R. 32–33); that, although he did discuss union matters with the men while taking soundings, the Company had no rule prohibiting the men from talking while on watch (R. 17–18, 403); and that he had not bothered or annoyed the engine crew while either he or they were working (R. 14, 39). Captain Lehne and Chief Engineer Hunger testified, on the contrary, that they had barred Babin from the engine room because he had no legitimate business there and had bothered the men while they were working. To support the assertion that Babin had no business in the engine room, both Captain Lehne and Chief Engineer Hunger testified that the sounding board was not inside the engine room but in the fantail, "the room where the steering gear is located" R. 412), situated approximately fifteen feet *above* and to the rear of the engine room (R. 397, 630). Soundings are admittedly posted

for the use of the engineers who must be able clearly to see the markings from their posts in the engine room (R. 397).

Particularly in the absence of any explanation as to why the sounding board could not have been located in the engine room, the Board found it incredible that the sounding board would be placed in such a position as to require the engineers to look up, approximately nine feet, through a doorway, to read the markings, as the Captain testified they were required to do (R. 411–412). Nevertheless, despite the Board's resolution, the court below found as follows (R. 883–884):

> Babin said that he was censured for bothering the men when working, and was ordered by the chief engineer to stay out of the engine room and foremen's quarters. He said that he went into the engine room because it was his duty to make the soundings and to tell the engineers when to pump. Both the chief engineer [Hunger] and the Captain [Lehne] said that the sounding board is not in the engine room, but in the fantail. Orders as to pumping were given by the master or made by telephone. On the whole record it is incredible that this was not the case on a modern ship.

In view of the fact that the *Peter A. B. Widener,* the ship in question, was built in 1906,[69] and

[69] United States Treasury Department, *Merchant Vessels of the United States*, 1943 (Gov't. Print. Office), p. 51.

therefore cannot properly be called a "modern ship," and that Babin's version of the location of the sounding board was more reasonable than the version given by Hunger and Lehne to justify their ejection of Babin from the engine room, we submit that the Board's resolution of the conflict was the correct one.

The record does not support the implication contained in the first sentence of the quotation from the court's opinion that Babin conceded that he was properly censured. Babin testified that he had not bothered the men while either he or they were working. It follows that, according to Babin's testimony, the Chief Engineer's order that he keep out of the engine room was designed to interfere with his legitimate organizing activity, and that the allegation that he was bothering the men was a pretext devised to disguise the improper character of the order. The same comments are applicable to the court's statement that each of the three organizers, Lee, Babin and Weissflog "admits being reprimanded on the ground that he carried his organization into a forbidden part of the ship or to excessive limits" (R. 883). None of the organizers admitted that they had in fact carried their organizing to excessive limits (R. 14–15, 39–40, 129, 146–147, 702–703; 418). The record, thus, affords no support for the court's conclusion that the organizers admitted that the officers' interference with

their organizational activities was provoked by any organizational excesses. The record likewise discloses no support for the court's finding that "not one of the three principal organizers, Lee, Babin and Weissflog, claims to have been prevented from engaging in union activities." Precisely the contrary is true (R. 14–15, 17–18, 58, 60–61, 62, 128–129, 135–136, 146–147).

A similar error underlies the court's statement that "Shartle * * * does not claim he was in any way hindered in his organizing" (R. 882). Shartle testified that he was warned by the engineers, and by the second and third mates that "I better watch my step or else I wouldn't be on the *Olds* any longer" (R. 196–197). "The advice of these men was not lightly to be disregarded by employees under their supervision." *National Labor Relations Board* v. *Quality Art Novelty Co.*, 127 F. 2d 903, 905 (C. A. 2).

4. *The Filbert — Captain Brinker.*—Captain Brinker of the *Filbert* was another Company witness whose testimony contains many contradictions (R. 807–811; 416–436). For example, compare his anger at seaman Lee for allegedly driving two firemen off the ship when "it was very difficult to obtain men in 1944" (R. 417–418), with his indifference at the quitting of seaman Conn since "I didn't go short [of men] so very much last year" (R. 432). Captain Brinker also insisted that his conversations with

Lee were always held in private (R. 422) and that the crew did not know what they were talking about (R. 430–431), statements that were contradicted by the testimony of Third Mate King, who appeared as a Company witness (R. 437–438), that the crew knew and discussed the fact that Lee and the captain spoke about the Union (R. 444–446).

5. *The Bunson—Captain Lawless.*—The failure of Captain Lawless of the *Bunson* to remember his own prior discussions also justified the trial examiner's refusal to credit his testimony (R. 814–815; 465–498). Thus, the captain denied that he had ever discussed "rotary shipping" or other points of the Union's program in a meeting he had held with the mates shortly before the election (R. 485–486), although Third Mate Carr, a Company witness (R. 356), who was admittedly present at the meeting, testified that the captain did discuss the Union's program including "rotary shipping" (R. 375–376, 485). Similarly, the captain denied that he had even heard any gossip about conversations relating to the Union carried on between Third Mate Carr and Third Assistant Engineer Scharmin (R. 356), in the presence of the crew (R. 472–473, 491), whereas the third mate appearing as a Company witness testified that the discussions had been openly held and "Everybody in the boat knew it" (R. 363).

As has already been stated, whatever questions may still be open as to the scope of judicial review under the Administrative Procedure Act and the Labor-Management Relations Act, it has been uniformly recognized that those acts do not empower the reviewing courts to review the record *de novo* and make their own findings as to credibility. Pp. 93, 98, *supra*. Even under the "clearly erroneous" test governing review of lower court decisions, Rule 52 (a) of the Rules of Civil Procedure provides that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Since there was no basis for overturning the Board's rulings on credibility, the court below clearly erred in refusing to hold that the acts found by the Board to be unfair labor practices actually occurred.

D. THE BOARD'S FINDING DOES NOT REST ON INCOMPETENT OR HEARSAY EVIDENCE

The court below found that the Board relied upon hearsay and incompetent evidence. An examination of the record will show that although hearsay was admitted in evidence, in most instances the Board did not rely on it, and indeed, sometimes specifically disclaimed any such reliance (*e. g.*, R. 814, n. 12). Of the three items referred to by the court (R. 882), the Board did not rely on the first, and the others were admissible under ordinary principles of evidence.

Before discussing these three items, we wish to point out that at the time the hearing was held and the case decided by the Board, prior to the enactment of the 1947 Act, the Board was not bound by the rules of evidence applicable to courts as long as its findings are "supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 873 (C. A. 2), certiorari denied, 304 U. S. 576; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229–230. Accordingly, the Board's decision is not subject to reversal for failure to observe a provision of the statute which was not in effect at the time the Board acted. (See pp. 40–42, 80, n. 57, *supra.*)

1. The court below stated that "certain wholly incompetent testimony was admitted to the effect that Shartle was discharged because of union activity" (R. 882). The testimony referred to is that of Shartle who stated that following his discharge he discussed the matter with numerous persons on the ship and they all assured him that he was not incompetent and that he was dismissed because of his union activity (R. 173–174). No objection was raised to the introduction of this evidence, and no motion to strike it was made. Nevertheless, neither the trial examiner nor the Board based the finding that Shartle had been discriminatorily discharged in

any part upon this testimony (See 337 U. S. 660, n. 3). Even if the admission of the testimony under these circumstances constituted error, which we deny, the error could not possibly have been prejudicial, nor could it militate against the propriety of the Board's finding in Shartle's case. Cf. *Berkshire Knitting Mills* v. *National Labor Relations Board,* 139 F. 2d 134, 137 (C. A. 3). Even if the new statutes are applicable, they provide only that the Board's decisions must be based upon probative evidence,[70] not that the Board's findings must be set aside if other evidence not relied on is included in the record. *Sisto* v. *Civil Aeronautics Board,* 179 F. 2d 47, 51 (C. A. D. C.).[71]

2. The court below also held that the Board had improperly relied upon certain testimony which the court found inadmissible under the hearsay rule (R. 882, n. 5). The testimony thus

[70] Administrative Procedure Act, Sections 7 (c), and 10 (e).

[71] "* * * Therefore, the requirement that 'no order shall issue except upon the consideration of the whole record * * * and as supported by and in accordance with reliable, probative and substantial evidence,' must mean that where there is reliable, probative and substantial evidence, any findings, conclusions, and orders based thereon will be sustained even though unreliable, non-probative and unsubstantial evidence was allowed in by the examiner. The admission of irrelevant or incompetent matter before an administrative agency does not constitute reversible error, if there is substantial evidence in the record to sustain the agency's determination. This being the case prejudice cannot be alleged to the admission of improper evidence unless it be shown that the Board relied on it" (179 F. 2d at 51).

referred to relates to the Board's findings that Captain Wallace indicated to seaman Sims that it was his intention to discharge Anderson for union activity and thereby, impliedly, also threatened Sims with discharge unless Sims refrained from further union activity (R. 811–812; 280). This finding is supported by the uncontradicted testimony of Sims himself, which was credited by the Board, that Captain Wallace stated to him that he intended to seize any opportunity that offered itself to discharge Anderson because "he is a great union man." We submit that Sims' testimony was not hearsay. The making of the statement itself constituted an unfair labor practice, since the necessary effect of making it was to inhibit at least Sims' union activity. That under these circumstances Sims' testimony as to the making of the statement is admissible and probative is apparent.

3. The court below further held that testimony relied upon by the Board to support its finding that the Company "attempted to have Lee discharged because of his union activity" (R. 811), was also inadmissible as hearsay (R. 882, n. 5). The testimony referred to relates to the Board's finding that Chief Engineer Curry, Lee's supervisor, had advised Lee that his discharge had been urged upon Captain Brinker by John Zyp, of the Company's personnel staff (R. 810–811; 134–135). The Board's finding as to what Curry said is supported by the uncontradicted and credited testi-

mony of Lee, to whom the chief engineer repeated the threat of discharge. Since Curry was one of the top ranking officers on the ship, with authority to hire and fire (R. 670–671), he was in a position effectively to warn Lee that his job was at stake because of Lee's union activities. The statement of Curry, an agent of the Company (cf. *International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80; *Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 521), to Lee, was properly admitted under the exception to the hearsay rule, which provides that declarations of an agent are admissible as original evidence against the principal (*Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 250), particularly since in the instant case no objection was raised when Lee testified. The Board therefore properly found the Company responsible for the unfair labor practice resulting from Curry's statement to Lee, since the statement would normally be expected to have the effect of curtailing Lee's organizational activities. In that respect Lee's testimony was admissible and could be made the basis for an appropriate finding.

In contrast, although hearsay testimony does appear elsewhere in the record the Board carefully—and sometimes expressly—abstained from making any findings based upon this testimony even though such evidence was admissible under the Wagner Act, and could be made the basis of findings in connection with other related

evidence.[72] See for example the Board's refusal to base findings upon the testimony of seaman Herrick concerning coercive statements made by Captain Penzenhagen of the *McGonagle* (R. 814, n. 12; 233–244).

We submit that even if the provision in the 1947 Act making the rules of evidence controlling were applicable, the Board's findings do not rest on improperly admitted testimony. In addition, it is clear that apart from the items in question the findings are supported by ample evidence unquestionably admissible and probative.

E. THE COMPANY IS RESPONSIBLE FOR THE UNFAIR LABOR PRACTICES COMMITTED

The court below held and respondent contends that responsibility for the action of the ship officers cannot be traced to the central management of the Company, that the Ferbert letters (found by the Board to be a part of the pattern of unlawful conduct) immunized the Company from responsibility and that the fact that unfair practices were proved on only seven ships estab-

[72] Cf. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229–230; *National Labor Relations Board* v. *Service Wood Heel Co.*, 124 F. 2d 470, 472–474 (C. A. 1); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 873 (C. A. 2), certiorari denied, 304 U. S. 576; *Union Drawn Steel Co.* v. *National Labor Relations Board*, 109 F. 2d 587, 592 (C. A. 3); *Martel Mills Corp.* v. *National Labor Relations Board*, 114 F. 2d 624, 629 (C. A. 4); *National Labor Relations Board* v. *American Pot. & Chem. Corp.*, 98 F. 2d 488, 493–494 (C. A. 9), certiorari denied, 306 U. S. 643.

lishes that the improper acts were sporadic and were not part of a general policy.

The short answer to this contention is that it is foreclosed by the decision of this Court. The same argument was made by the Company at the first argument here. The Court decided that the evidence in this case was "substantial enough under the Wagner Act" to justify the Board's order. But the amendments to that Act in no way changed the applicable law as to the extent of an employer's liability for the anti-union acts of his supervisory employees or as to the number or extent of violations necessary to establish an employer's culpability. Accordingly, the Company cannot be heard to contend that it is not responsible for these violations; its responsibility is unchanged from what it was under the earlier Act, and this Court has expressly approved the Board's findings under that Act.

1. The Company Is Liable for the Illegal Conduct of Its Ship Officers Even Though It Was Unaware of and Might Have Disapproved Such Conduct

Quite apart from the prior decision of this Court, however, controlling precedents establish the Company's responsibility for the acts of its officers, whether or not they were anticipated by the Company's higher officers. A similar contention was squarely rejected in *Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514, 519, where the employer was held responsible although it was unaware of the antiunion con-

duct of its supervisors when it occurred, and issued instructions to them to be neutral as soon as it learned of their activities. The Court there stated (at p. 521):

> The question is not one of legal liability of the employer in damages or for penalties on principles of agency or *respondeat superior,* but only whether the Act condemns such activities as unfair labor practices so far as the employer may gain from them any advantage in the bargaining process of a kind which the Act proscribes. To that extent we hold that the employer is within the reach of the Board's order to prevent any repetition of such activities and to remove the consequences of them upon the employees' right of self-organization, quite as much as if he had directed them.

That such a rule should be particularly applicable to cases involving seamen is self-evident. The authority of ships' officers is not limited solely by the authorization granted them by the Company, but is based as well upon maritime law and custom. It is far greater than that of supervisors in industrial plants. This Court said in *Southern S. S. Co.* v. *National Labor Relations Board,* 316 U. S. 31, 38, "Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land." Obviously therefore, the effect

upon employees of the statements and acts of the captains and officers of the seven vessels cannot be underestimated by a comparison with similar situations on shore. To the seamen the officers are the Company. And since the Company has placed this power in the hands of its officers, it must assume the responsibility for their actions, and cannot hide behind an alleged statement of neutrality.

That the Company did obtain benefit "of a kind which the Act proscribes" from the intimidatory conduct of the captains, mates and engineers is manifest. Beyond doubt the effect of the threats which were directed at the organizers and of the unduly restrictive rules concerning solicitation was to hamper efforts at unionization aboard the ships. The Company was therefore "within the reach of the Board's order to prevent any repetition of such activities and to remove the consequences of them upon the employees' right of self-organization."

The Company contends, however, that its instructions to the officers were issued prior to their commission of any of the unfair labor practices and that therefore the *Heinz* case is not applicable (Brief, p. 36). We submit that the doctrine enunciated in the *Heinz* case is equally applicable in such a situation, particularly where, as here, the Company did not clearly and definitely advise its employees concerning the

alleged orders of neutrality[73] (R. 830; 667–668). Courts of Appeals have applied the principle of the *Heinz* case and held employers liable for the conduct of their supervisors in similar cases. Thus in *National Labor Relations Board* v. *Bird Machine Co.*, 161 F. 2d 589, a case in many respects similar to the instant case, the Court of Appeals for the First Circuit said (at p. 591):

> Where, however, as here, disparaging remarks by supervisory employees are joined with threats of economic reprisal and loss of privileges, they may be used to indicate a course of conduct coercive in nature. See *N. L. R. B.* v. *American Laundry Machinery Co.*, 2 Cir., 1945, 152 F. 2d 400. Certainly the foremen's threats concerning loss of privileges, including rest periods, vacations and bonuses are a violation of Section 8 (1) of the Act. See *H. J. Heinz Co.* v. *N. L. R. B.*, 1941, 311

[73] The Company contends that the "Fulbert" letters evidence such notice to the seamen (brief, p. 36). However, the Board found these letters themselves to "constitute an integral and inseparable part of the respondent's otherwise illegal course of conduct" (R. 855). Obviously, therefore, they cannot be considered as true statements of neutrality. In any event the letters do not specifically advise the employees that the Company had given strict orders to its supervisors to abstain from engaging in antiunion activity. The general statements of neutrality in the letters (R. 744–746) are obviously insufficient to counteract the misconduct of the ships' officers. Compare *Boeing Airplane Co.* v. *N. L. R. B.*, 140 F. 2d 423, 425–428 (C. A. 10), where the employer publicized to its employees its repeated instructions to its supervisors concerning their neutrality.

> U. S. 514, 61 S. Ct. 320, 85 L. Ed. 309. But the respondent contends that it is not chargeable with responsibility for these foremen activities since respondent's president at the commencement of the Union campaign had called a meeting of supervisory personnel and explicitly instructed them not to interfere with the union activity of the employees. The purport of these instructions was not conveyed generally to the employees although there was testimony that some few knew of the position that the president had taken. But the *Heinz* case has held that where the employer may gain advantage from such unauthorized foremen anti-union activities it is within the Board's province to prevent repetition thereof by its order.

See also, *North Carolina Finishing Co.* v. *National Labor Relations Board,* 133 F. 2d 714, 716–717 (C. A. 4), certiorari denied, 320 U. S. 738; *National Labor Relations Board* v. *Chicago Apparatus Co.,* 116 F. 2d 753, 757–758 (C. A. 7); *National Labor Relations Board* v. *Aintree Corp.,* 132 F. 2d 469, 471–472 (C. A. 7), certiorari denied, 318 U. S. 774; *National Labor Relations Board* v. *Schaefer-Hitchcock Co.,* 131 F. 2d 1004, 1007 (C. A. 9).[74]

The Company's mere lack of knowledge of the unlawful conduct of its licensed personnel does

[74] See to the same effect the opinion of the court below in *National Labor Relations Board* v. *Mylan-Sparta Co.,* 166 F. 2d 485, 490.

not, as the court below apparently believed, relieve it of responsibility. For the Company's responsibility under the *Heinz* case does not turn on whether it approved of or ratified the illegal conduct of its supervisors, but upon whether the action of the supervisors resulted in restraints upon employee freedom which the Act forbids. At no time, as the Company's industrial relations manager testified, did the Company advise the employees, or the Union, that it had instructed its supervisors not to interfere with the employees' organization efforts (R. 664, 667–668). Under these circumstances the Company is in no position to claim advantage from the fact that conduct of its licensed officers, allegedly in violation of its orders, was not brought to its attention. Cf. *Boeing Airplane Co.* v. *National Labor Relations Board,* 140 F. 2d 423, 425–428 (C. A. 10). The unfair labor practices of the supervisory officers cannot therefore lightly be brushed aside, or held to be unrelated to their position as Company representatives. The Board properly attributed such practices to the Company and required the Company to remedy them.

2. The Board's Conclusion That the Activities of the Officers Were Part of a Single Pattern of Conduct Tied in With the Policy of the Company Is Amply Supported by the Record

Not only is the Company responsible as a matter of law for the unfair labor practices committed by the ship's officers, but the record supports the Board's findings that the activities

of these officers were in fact an integral part of a broad Company pattern of illegal interference with the rights of the employees. The Company attempts to refute this finding by pointing to the instructions it gave to its supervisory personnel. But as has been seen these instructions were concededly never communicated to the employees who were, however, made acutely aware of the Company's real attitude through the conduct of the Company's representatives.

The Company's antiunion campaign reached its peak in the period immediately preceding the company-wide election. And the conduct of the Company's leading representatives on each of the ships as to which evidence was introduced was so strikingly similar as to warrant the Board's inference that it passed beyond the realm of coincidence.[75] Thus, Captain Gerlach of the *Morse* resorted to physical force to interfere with the organization activities of Weissflog, while on the *Filbert* the organizer was threatened with discharge, a fate which actually overtook the organizer on the *Olds,* and which threatened his successor. Meanwhile on the *Johnson,* Captain Wallace intimidated the organizer by threatening to fire a known union supporter, while on the *Widener* the organizer was subjected to repeated abuse at the hands of the officers, who attempted to limit his legitimate organizing activities, treat-

[75] The facts summarized below have been stated more fully with appropriate record references at pp. 7–21, *supra.*

ment similar to that accorded the organizers on the *Morse* and *Johnson*. On the *McGonagle*, *Bunson*, and *Morse*, the captains engaged in direct interrogation of their men as to their union membership, while Captain Wallace of the *Johnson* did not stop with interrogation but broadly hinted that the Company kept the union hall under surveillance.

The similarity of antiunion tactics may perhaps be explained as the typical manner in which recalcitrant employers, acting individually and not as part of an organization, have sought to interfere with, restrain, and coerce their employees in violation of the law. But direct evidence that the several captains were not merely individually inventing ways to interfere with their employees is to be found in the campaign of vilification and abuse heaped upon the union supporters and in the common use of racial prejudices to disrupt the attempt at organization. The similarily of the expressions used by the officers on each of the ships here involved strongly supports the Board's finding that they came from an underlying Company-wide pattern.[76] Their repetition

[76] See for instance the testimony concerning (1) Captain Brinker of the *Filbert* (R. 127–133, 136–138); (2) Captain Wallace of the *Johnson* (R. 250–251, 280); (3) Captain Penzenhagen of the *McGonagle* (R. 225, 235, 238); (4) Captain Lawless of the *Bunson* (R. 85); (5) Captain Gerlach of the *Morse* (R. 42–43); and Captain Murray of the *Olds* (R. 171, 215). See also the testimony concerning the other officers at pp. 58, 64, 86, 214, 226–227, 262, 281–282, of the record.

on each ship, at about the same time, lends strong support for the Board's finding that these supervisors were acting in accordance with a "pattern and a design" (R. 827). When considered in that light there can be no question but that they were a part and parcel of the coercive conduct which the Company adopted to discourage union membership among its employees."

The Ferbert letters.—While this course of conduct continued the Company addressed to the employees the "Ferbert letters" (R. 743–746) which, viewed as a whole, were designed unmistakably to convey to them the Company's opposi-

[11] In support of its conclusion that the coercive antiunion conduct of the licensed personnel did not reflect the policy of the Company, the court stated that "permission was given for the presence of a union organizer on each of the 73 ships" (R. 880, see also 883). But there is not a scintilla of evidence in the record that the Union placed organizers on the ship with the knowledge and permission of the Company or that the Company authorized organizers openly to engage in union solicitation. Cf. *National Labor Relations Board* v. *Cities Service Oil Co.*, 122 F. 2d 149 (C. A. 2). The men involved were employees of the Company, some of whom volunteered to become organizers long after they had originally joined the Company's fleet. Others were seamen who were hired by the Company not because they were organizers but because of its need for men during the war. As to these it nowhere appears that this Company even knew they were organizers. Cf. *National Labor Relations Board* v. *Cities Service Oil Co.*, 129 F. 2d 933 (C. A. 2). Indeed, the statements and conduct of the ship's officers when they ascertained the identity of the organizers by itself refutes the hypothesis that the Union was freely permitted by the Company to place organizers on each of the ships.

tion to the Union. Interspersed in the letters, however, appeared the following statements: "The Company recognizes the right of each employe to join any Union he may select and such membership will not affect his position with the Company." * * * "No one must threaten you in this election. It is your privilege to make up your own mind as to how you should vote."

With respect to these letters, the Board concluded that (R. 829):

> The restraining character and effect of * * * the [Company's] conduct as a whole, were not nullified by the statements in the letters that the employees had the right to join a labor organization. The letters were received in an atmosphere already charged with the supervisors' attitude of hostility and opposition to the Union. And even if these statements were intended as an assurance that employees would not be discriminated against because of their union activities, the assurance was rendered meaningless and suspect in the eyes of the employees by the [Company's] entire course of coercive, intimidatory, and discriminatory conduct, both before and after the receipt of these letters.

The court below found, on the other hand, that the statements in the Ferbert letters "instructed the men positively as to their rights" and that in these statements the Company "fully communicated its attitude, and in effect offered [the men]

its protection [against coercion by the licensed personnel]." The court held that the Board's contrary conclusion was "error as a matter of law."

We submit that in thus rejecting the Board's finding that the statements in the Ferbert letters did not dispel the effects of the coercive conduct of the licensed officers the court below not only exceeded the scope of its reviewing power (*"Calculating a cumulative effect on employees is not a job for this Court"* (*National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U. S. 226, 231)), but that the inference which it drew finds far less support in the record than that which was drawn by the Board.

The Ferbert letters (R. 803; 57, 743–746) although not violative *per se*, must be considered in the light of their use and application by the Company's supervisors. It is certainly inferable from their conduct that the ships' officers saw in the letters opposing unionization apparent approval and authority for their conduct. The more plainspoken warnings of the officers[78] could

[78] That these officers were not as careful of their choice of language as the Company's president is apparent from the record. Compare, for instance, President Ferbert's "it is not necessary to join any labor organization" (R. 744) with Captain Lehnes' "The Company does not hire any Union men aboard any of their ships" (R. 14), or Captain Wallace's "I don't want any part of [the union] on my ship" (R. 280). Similarly, Ferbert's statment, "In deciding whether you wish to select the National Maritime Union as your bargaining

hardly help but be regarded by the men as a reflection of the policy of opposition stated in the letters. It would hardly be reasonable to expect the men to assume that the chief officers of the ships were violating company instructions.

The statement in the letters "No one must threaten you" (R. 880), which was construed by the court below as an assurance to the employees against threats from the licensed personnel under whom they served, when read in context, may well have been meant to refer not to coercion by officers, of which the Company was allegedly unaware, but to coercion which the Company contended was being practiced by union organizers (see R. 382, 383).

The "neutrality" statements contained in the Ferbert letters certainly did not suffice to preclude the Company from gaining forbidden advantage from the illegal restrictions imposed by the licensed personnel. These ships' officers were not "minor supervisors" whose individual views might lightly be disregarded by employees if contrary to an unequivocal policy stated by management. Cf. *National Labor Relations Board* v.

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representative or not, you should make up your mind whether representation by the Union will better serve your needs in your relationship with the Company" (R. 745), could have been read by the employees in the light of the statement by Captain Wallace "* * * you CIO people, you are going to cause these men to lose their bonus. * * * Pittsburgh isn't going to give them the bonus * * *" (R. 280).

Montgomery Ward & Co., 157 F. 2d 486, 501 (C. A. 8), and cases cited. On board ship the licensed personnel have complete control of employment conditions (R. 671). It is their policies, not those of higher management whom the seamen rarely, if ever, see, which are controlling.

The court below misconceived the nature of the Board's finding concerning the relation of the Ferbert letters to its finding that the acts of the ships' officers were cut from the same cloth. The court below stated: "The entire case is bottomed by the Board on what it finds to be the adoption by the [Company] of a general course of coercive conduct" which "is based largely upon the letters signed by [the Company's] president A. H. Ferbert" (R. 877). The court below attributed much greater significance to the letters than did the Board. The Board did not find, as the court assumed, that the letters created the pattern of violative conduct which was followed by the Company's licensed officers. The Board found that the letters were not violative *per se*, and that only when considered in the light of and in context with the pattern which was already found to exist did they assume an illegal character (R. 828–829, 855). The pattern was established by "the threats, the acts of intimidation and discrimination, and the restraints imposed upon union organizers" (R. 828), and by the similarity in the

tactics used by the Company's supervisors on each of the seven ships involved herein (see pp. 126–127, *supra*). And, contrary to the assumption of the court below, the Board did not treat the Ferbert letters as necessary to establish the Company's liability for the pattern of conduct of its supervisors.

The court below (R. 878–879) sought to discredit the Board's finding with respect to the Ferbert letters by disagreeing with the Board's conclusion that certain statements in the letters "contained implications which were misleading" to the employees (R. 806). But the Board was right and the court below wrong.

The Board found (R. 806) that the letters distorted and misstated the effect of the Union's "rotary hiring" policy upon promotions. The letter of June 1, 1944, asserted that under that policy "if you ship out as deck-watch, you cannot be promoted to a watchman or lookout when there is a vacancy" (R. 745). This was not true as to vacancies occurring on the same ship (R. 122–123), but only as to transfers to other vessels. If the evidence is read with this distinction in mind, there is no difficulty and no conflict. The court below failed to note the distinction, and for that reason erroneously treated testimony relating to promotions involving transfers as applying to all promotions.

The Board also found that the "letters were intended and designed to discredit the Union by impressing upon the employees the thought that they could gain no benefits or advantages through collective bargaining not obtainable through individual bargaining" (R. 828). This finding was based upon the statements in the letter of May 2, 1944 (R. 743), that "this Company pays the same wages that are paid on all Great Lakes bulk freighters, regardless of whether they have a Union contract," and "neither the Union nor the Company has today control over what wages shall be paid" and "wage rates * * * have been frozen by the government." The Board found that the letter was designed to leave the implication that the Union would be powerless to secure any wage increase because of governmental wage stabilization policy. But the record shows, and the Company knew, that the wage stabilization policy did not preclude all upward wage adjustments, and indeed that the Union had succeeded in obtaining such adjustments for employees it represented (R. 105–112).

The court below disagreed with the Board's finding (R. 806) that the letter of June 1 represented that wages was the only term of employment which the Union as collective bargaining agent could effect. This disagreement was based upon a portion of the letter of May 2, 1944 (R. 743), which stated that if the Union won the election it

would have the "sole and exclusive right to represent you on all matters regarding rates of pay, wages, hours of employment and other conditions of employment." Read in context, however, this statement could reasonably be interpreted as not calculated to dispel the impression that only in the matter of wage rates could Union representation possibly benefit the employees, but rather to indicate the wide sweep of matters as to which, by selecting the Union, the employees would lose the right to represent themselves. The Board was entitled to have its reasonable finding as to the effect of the letter upon the employees accepted by the court below, even if another interpretation of the letter was possible. *Cf. Federal Trade Commission* v. *Pacific Paper Assn.*, 273 U. S. 52, 62, 63.

That the Board's treatment of the Ferbert letters as evidence of unfair labor practices was proper under the law as it stood prior to the enactment of Section 8 (c) is established not only by the decision of this Court in the instant case but by numerous decisions in other cases.[79] Neither in this Court nor in the court below did the Government concede that the subsequent enactment of Section 8 (c) could be given retro-

[79] See, *e. g.*, *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477; *Thomas* v. *Collins*, 323 U. S. 516, 537–538; *National Labor Relations Board* v. *Mt. Clemens Pottery Co.*, 147 F. 2d 262, 264 (C. A. 6); *National Labor Relations Board* v. *Thompson Products, Inc.*, 130 F. 2d 363, 368–369 (C. A. 6).

active effect so as to invalidate the Board's findings with respect to the letters as evidence of the unfair labor practices in this case (see, pp. 44, 46, *supra*). The Government's concession went no further than to state that since Section 8 (c) immunized letters such as these which are published while 8 (c) is in effect, the Board's order does not preclude their future repetition.

3. The Fact That Evidence Related Only to 7 of 73 Ships Does Not Exculpate the Company

Finally the Company argues, and the court below held, that since evidence of unfair labor practices was adduced as to only seven of its seventy-three ships, the violations were of a sporadic nature and could not properly be attributed to the Company. This contention is difficult to reconcile with the concession of the court below (R. 880) that "coercive acts actually performed even on one ship would render the employer liable."[80]

From the fact that "no complaint whatever has been made as to some 540 supervisors on 66 ships" the court below drew the inference that on these ships the Company's "instructions [to its officers to be impartial] were acted upon" (R. 880). We submit, however, that in the absence of any concession by Board counsel that no violations occurred on the remaining ships, and in

[80] Counsel for the Company made the same concession before this Court at the last argument.

view of the facts that the trial took place during wartime when potential witnesses were scattered and unable to appear, that the testimony relating to the seven ships sufficiently disclosed that the officers on all of these ships had violated the Act in much the same manner, and that further testimony of the same character regarding other officers in other ships might well have been regarded as merely cumulative, the mere failure to adduce evidence with respect to the other ships does not bear the significance attached to it by the court below.

The hearings in this case took place between July and October 2, 1945, about a year and a half after the organizing campaign leading up to the 1944 election, when most of the unfair labor practice incidents occurred. During almost the entire period the country was actively engaged in a war, and seamen were in great demand and were constantly shifting from the Lakes to the high seas (R. 241–242). It cannot, therefore, be assumed that the Board had available all witnesses who might have supported its case. Indeed, as counsel for the Union stated at the hearing "The Union has made every effort to find every seaman involved in these ships in the year 1944, during the period covered by the complaint. Except for the ten or eleven witnesses we have managed to produce now, these were the only ones we could produce after a search over a period of a year.

We have been unable to find any additional ones. These men are shipping. They are shipping on both oceans. It is not an easy matter to bring these men to a hearing just when we want them brought. The Company has a fairly easy time bringing its masters and mates. But you can't bring unlicensed men who are sailing under the orders of the War Department. It is almost miraculous that we have brought as many as we have" (R. 242). Board counsel added, "I would like to say, further, that we have affidavits sworn to before agents of the Board of several others, whom we cannot secure for this hearing" (*Ibid.*). He also stated, "I have a good many affidavits of men who are scattered on the seven seas. It is impossible to produce them" (R. 241). The Company's repeated contention that no evidence was adduced as to the other ships because no unfair labor practices had been committed on them is therefore unwarranted under the circumstances. In view of the nature of the industry and the wartime conditions prevailing during that period, no inference in either direction can properly be drawn.

In any event such additional evidence, even if available, would have been cumulative and therefore not decisive. The printed record herein contains more than 860 pages, and the hearing took almost ten days, including evening and night sessions, and was spread over a period of more than two months. Additional evidence of unfair labor

practices similar to those already proven would have extended the hearing unreasonably, and would have served no useful purpose. Cf. *N. L. R. B.* v. *Donnelly Garment Co.*, 330 U. S. 219, 232.

Since the Board found on substantial evidence that the Company had engaged in violative practices on seven ships, its remedial order based upon such findings must be sustained. The question is not how many employees were coerced or discriminated against but whether the Company, through its supervisors, did interfere with, restrain, or coerce or discriminate against *any* of its employees in violation of Section 8 of the Act. If there is evidence to sustain the Board's findings that the Company did engage in violative practices with regard to the 250 crewmen on the seven ships about which testimony was adduced, the Company must be held responsible even though no evidence was produced relating to the remainder of the fleet.

The courts have not heretofore questioned the validity of Board orders because unfair labor practices were shown to have occurred on a few ships of a fleet. Thus, in *South Atlantic Steamship Co.*, 12 N. L. R. B. 1367, unfair labor practices were proven to have occurred on only one of a fleet of six ships. Nevertheless the company was held liable by the Board, was directed to post compliance notices on all its docks and vessels (12 N. L. R. B., at p. 1383), and

the order was enforced in full. *South Atlantic Steamship Co.* v. *N. L. R. B.*, 116 F. 2d 480 (C. A. 5), certiorari denied, 313 U. S. 582. Only two ships out of twenty-eight were involved in the case of *The Texas Company*, 42 N. L. R. B. 593, but the Board there too found the company responsible, and ordered posting on all its ships and docks (42 N. L. R. B., at p. 609). In decreeing enforcement of the Board's order, *The Texas Company* v. *National Labor Relations Board*, 135 F. 2d 562, the Court of Appeals for the Ninth Circuit stated (at p. 563):

> This evidence is sufficient to warrant the Board's findings of interference, restraint and coercion. * * *. The Board was within its powers in concluding that these discharges were *pursuant to the anti-union attitude of petitioner* as shown from the testimony concerning Baldwin's [a mate] statements. * * *. Since two vessels and their officers are involved, it is no abuse of the Board's discretion in ordering the usual notices posted in several places accessible to petitioner's employees. [Italics supplied.]

Similarly in *Waterman Steamship Corporation*, 7 N. L. R. B. 237, unfair labor practices were proven to have taken place on only three ships of a fleet of twenty-six.[81] The Board nevertheless directed the company to post compliance notices on all its ships,

[81] Although the number of ships owned by the Waterman Company does not appear in the Board's decision, it is set forth in another decision in a representation case reported

and this Court directed enforcement of that order. *National Labor Relations Board* v. *Waterman S. S. Corp.*, 309 U. S. 206, 210, 221. And in *Isthmian Steamship Company*, 22 N. L. R. B. 689, where unfair labor practices were proven in connection with but one of twenty-seven ships, the Board's findings were held sufficiently supported and the order enforced. *National Labor Relations Board* v. *Isthmian Steamship Co.*, 126 F. 2d 598, 601 (C. A. 2). In none of the cases cited above did the courts consider the possibility that unless violations were proved on more than a few ships—and in each case the number involved is comparable percentage-wise to those in the instant case—the company could not be held liable for those unfair labor practices which were found to have taken place. See also, *National Labor Relations Board* v. *Phillips Gas & Oil Co.*, 141 F. 2d 304, 306 (C. A. 3); *National Labor Relations Board* v. *Hollywood-Maxwell Co.*, 126 F. 2d 815, 819 (C. A. 9).[82] The amended act made no change in the applicable law in this respect. *National Labor Relations Board* v. *Public Service Transport*, 177 F. 2d 19, 124 (C. A. 3), vacated on other grounds, 125.

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six months later and covering approximately the same period involved in the unfair labor practice case. *Waterman Steamship Corporation*, 10 N. L. R. B. 1079, 1080.

[82] It is interesting to note that in the *Hollywood-Maxwell* case, the Board found that the employer had committed unfair labor practices in one plant, and limited the application of its order to that plant. The court, *sua sponte*, modified the Board's order to make it applicable to all plants operated by the company (126 F. 2d, at p. 819).

Even if the Company had offered testimony as to the complete absence of any violative conduct by the officers of sixty-six vessels, such evidence, if admissible, would not affect the Board's determination that as to the seven ships here involved unfair labor practices were proven. This would be sufficient to justify a fleet-wide remedial order. Similar conclusions have been reached in connection with violations of other statutes. Thus in *Bowles* v. *Montgomery Ward & Co.*, 143 F. 2d 38, the Court of Appeals for the Seventh Circuit affirmed an injunction restraining further violations of the Price Control Act, although evidence was adduced that violations of a few regulations had been found in only twenty-five out of 640 stores owned by the company. The injunction itself was nation-wide in scope,[83] and prohibited violations of any regulations under the act. And in *United States* v. *General Motors Corp.*, 121 F. 2d 376, certiorari denied, 314 U. S. 618, the same court affirmed the conviction of the corporation of violation of the antitrust laws based upon the testimony of forty-seven dealers who testified they were coerced, although the corporation offered to produce the remainder of its 15,000 dealers in the United States to prove the contrary (121 F. 2d, at pp. 397–398). Thus,

[83] Although the opinion of the court does not mention the territorial scope of the order, the record reveals that it was applicable to all operations of the company throughout the country.

if the employees on the other sixty-six ships had been called to testify, and had given testimony that there were no coercive acts committed, the Board would nevertheless be justified in rejecting such evidence as immaterial and in holding the Company responsible for the unfair labor practices committed on the seven ships concerning which positive evidence of violative conduct was adduced. Cf. *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U. S. 219, 223–230.

Since negative testimony could not affect the validity of the Board's findings, obviously the failure to adduce such testimony should have no greater probative value. And if the Board's findings of restraint and coercion may stand in the face of such testimony (330 U. S., at p. 231), then they must be sustained where no other evidence is adduced. *A fortiori* the failure of the Board to produce additional evidence to show that unfair labor practices were committed on the other sixty-six ships cannot raise an inference that the Company was not engaging in a course of conduct designed to interfere with, restrain and coerce its employees in violation of Section 8 of the Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be reversed and the cause remanded with directions to enforce the Board's order in full.

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SEPTEMBER 1950.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in

any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * * In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and

order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition

praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

* * * * *

2. The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. I, 141 *et seq.*) are as follows:

* * * * *

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or

condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

"(c) The expression of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

"SEC. 10. (b) * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without

back pay, as will effectuate the policies of this Act: * * *

* * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

* * * * *

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

* * * * *

3. The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are as follows:

* * * * *

SEC. 7 * * *

(c) *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. * * *

* * * * *

SEC. 10 (e) *Scope of review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action,

findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

* * * * *

SEC. 12. * * * This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no precedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Approved June 11, 1946.

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